FILED
APR 25 1957
JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. ...940

STATE OF TENNESSEE BOARD OF EDUCATION,
Petitioner,

v.

RUTH BOOKER et al.,
Respondents.

PETITION FOR CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit.

NAT TIPTON,
Advocate General,
Supreme Court Building,
Nashville, Tennessee,
Attorney for Petitioner.

GEO. F. McCANLESS,
Attorney General,
ALLISON B. HUMPHREYS,
Solicitor General,
Supreme Court Building,
Nashville, Tennessee,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 1-4477.

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RUTH BOOKER et al.,
Respondents.

PETITION FOR CERTIORARI
To the United States Circuit Court of Appeals for the Sixth Circuit.

MAY IT PLEASE THE COURT:

Petitioners respectfully pray that this Court issue its writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to reverse and review the decision of that Court in this case. The opinion of the

Circuit Court of Appeals is reported in 240 Fed. (2d), 689, and a copy thereof is hereto attached as an appendix to this petition.

The opinion and judgment of the Court of Appeals was rendered on January 14, 1957. A petition to rehear was filed within the time prescribed by the rules of that Court and was denied on February 7, 1957. Jurisdiction to review the judgment and decree of the Circuit Court of Appeals is claimed under U. S. C. A. Title 28, Section 1254 and Section 2101.

QUESTION PRESENTED FOR REVIEW.

The question presented for review is whether or not a plan for desegregation of the institutions of learning under the control of petitioner substantially complies with the directions for desegregation contained in the opinion of this Court in Brown v. Topeka Board of Education, 349 U. S. 294.

STATEMENT OF THE CASE.

Plaintiffs brought this suit as a class action in the District Court of the Western District of Tennessee seeking admission to Memphis State College, an institution under the control of the petitioner State Board of Education. The petition averred that the respondents were negroes, had made application for admission to such school but their request therefor was denied on the ground that they were members of the Negro race and that the Constitution and statutes of Tennessee required segregation of the races. The action was based upon U. S. C. A., Title 28, Sections 1331, 1343 and 2281, and averred the invalidity of the Constitutional and statutory provisions of Tennessee, requiring such segregation.

An answer was duly filed by petitioners averring in substance that the challenged provisions had never theretofore been declared invalid. Thereupon the petitioners set forth in their answer a proposed program for the definite desegregation not only of Memphis State College but all other institutions under their control. The plan proposed would immediately desegregate graduate work in the mentioned schools and desegregation of all other classes was to be accomplished on the basis of one class each year. The complete details of the plan of desegregation are to be found in the transcript pages 15a-18a inclusive.

Upon the hearing there was no contest as to the invalidity of the Tennessee constitutional and statutory provisions. The District Judge after a hearing concluded that the proposed plan was in keeping with the holding of this Court in Brown v. Topeka Board of Education, supra, and approved it. His finding of facts and conclusion of law are found at pages 91a-94a inclusive, of the transcript.

Upon appeal, the Circuit Court of Appeals of the Sixth Circuit reversed the District Judge, one Judge dissenting, and held the proposed plan not in accord with the principles announced by this Court for desegregation.

REASONS FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

I.

The judgment of the Circuit Court of Appeals for the Sixth Circuit is probably in conflict with the principles announced by this Court in Brown v. Topeka Board of Education, 349 U. S. 294.

II.

The present case seems to present the first instance to reach this Court of the validity of a plan for desegregation sought to be set up in conformity to its decision above mentioned. Some amplification of the principles there announced should be made to guide the lower courts in the solution of this complex problem.

ARGUMENT.

By statute the Tennessee Board of Education is vested with jurisdiction of five institutions of higher learning, among which is Memphis State College. These schools are enumerated at Section 49-3201 of Tennesse Code Annotated. It is not important to enumerate these schools by name.

Admission to these colleges is regulated by Section 49-3203, Tennessee Code Annotated, which so far as material reads as follows:

> "White persons, who are not under sixteen (16) years of age and who have completed the full four (4) year course of an approved high school shall be admitted to the teacher college or state normal school, without tuition, if residents of the state or if nonresidents but whose bona fide place of residence is in a county of another state lying immediately adjacent to a county in this state in which the teacher college or normal school is situated, or if such bona fide residence is within thirty (30) miles of the teacher college or normal school, provided, however, that there be no teacher college or normal school within the nonresident's own state, of equal distance to said nonresident's bona fide place of residence."

The effect of the decisions of the Supreme Court is to nullify the requirement of this statute that white students only be admitted with the result that following such decision students may not be excluded therefrom by virtue of race or color.

Memphis State College is located in Shelby County, Tennessee, in the west portion of the State, which contains the

highest density of negro population. For the year ending June 30, 1954, the negro high schools of Shelby County alone graduated approximately eleven hundred students (Appendix, p. 39-A). All of these students are eligible to enter Memphis State College if unrestricted admission thereto be decreed. Additionally, Memphis State College normally serves Counties of Hardeman, Tipton, Fayette, Haywood, Madison and Lauderdale, which have large negro population (Appendix, p. 38-A). The physical facilities of Memphis State College are already terrifically overcrowded (Appendix, p. 49-A).

Memphis State College is accredited by the Southern Association of Secondary Schools and Colleges (Appendix, p. 53-A). Accreditation is essential to the successful existence of an institution of higher learning in that, in the absence of accreditation, students taking work are not given credit for admission or work done by other schools (Appendix, p. 54-A). One of the standards for accreditation is that there must be a minimum of $300.00 per student expended for the academic year (Appendix, p. 54-A). For the previous scholastic year, Memphis State was able to spend but $310.00 per student (Appendix, p. 56-A). Appropriations for the institutions of higher learning under the jurisdiction of the Tennessee State Board of Education are made by the General Assembly of the State (Appendix, p. 58-A). These facts disclose that unrestricted admission at the present time would result, practically, in the destruction of Memphis State College as an institution of higher learning.

It is suggested in the brief of appellants that the school is not under obligation to open its doors for the unbridled admission of all students and that it might lay down standards and establish criteria for admission which would prevent overtaxing its facilities (Appellants' Brief, p. 14).

This insistence loses sight of the fact that under the statute above quoted admission to this school may not be denied to any resident of this State and to certain non-residents who meet the conditions prescribed in the statute, and, therefore, this school has no recourse except to undertake to admit all qualified persons who apply therefor.

Complaint is made that non-residents are admitted to this school. There is no suggestion in the record that any have been admitted who were not accorded admission under Section 49-3203 of the Tennessee Code, Annotated, quoted hereinabove.

Complaint is made that the appellants will thus be deprived of educational facilities until 1959-1960. This insistence does not take into consideration the fact that the State of Tennessee now maintains adequate facilities for the education of negroes during the so-called transition period (Appendix, p. 41-A).

It cannot be doubted but that immediate transition to a non-segregated basis threatens the scholastic standing of Memphis State College. To avoid this threat or possibility, the instant plan was devised after conference with a large number of persons interested in the welfare of education. The District Judge to whom the plan was presented is a native of the City of Memphis and familiar with local conditions and in position to judge of the proper spirit to be met in integration, has completely commended the plan and the efforts of the members of the Tennessee State Board of Education to comply literally with the commands of the Supreme Court. His opinion appears in the appendix (pp. 85-A-88-A, inclusive), and discloses a recognition upon his part of the several factors that must of necessity enter into integration.

Wherefore petitioners pray that the writ of certiorari issue from this Court to review and reverse the judgment and decree of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

NAT TIPTON,
Advocate General,
Supreme Court Building,
Nashville, Tennessee,
Attorney for Petitioner.

GEO. F. McCANLESS,
Attorney General,
ALLISON B. HUMPHREYS,
Solicitor General,
Supreme Court Building,
Nashville, Tennessee,
Of Counsel.

I hereby certify that I have caused to be mailed three copies of this petition for certiorari to H. T. Lockard, Esq., 322½ Beale Avenue, Memphis, Tennessee, he having been designated for the service of pleadings.

Nat Tipton.

APPENDIX A.

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Cause Argued and Submitted.

October 15, 1956—Before Simons, Chief Judge, Allen and Miller, Circuit Judges.

This cause is argued by Robert L. Carter for appellant and by Nat Tipton for appellees and is submitted to the court.

Judgment.

(Filed January 14, 1957.)

Appeal from the United States District Court for the Western District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case is remanded to the District Court for further proceedings in accordance with the majority opinion herein.

Opinion.

(Filed January 14, 1957.)

No. 12775.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

Ruth Booker, an Infant, by Dovie Booker, Her Mother and Next Friend, et al., Appellants, v. State of Tennessee Board of Education, et al., Appellees.	Appeal from the United States District Court for the Western District of Tennessee, Western Division.

Decided January 14, 1957.

Before Simons, Chief Judge, Allen and Miller, Circuit Judges.

Allen, Circuit Judge. This case arises upon complaint of five plaintiffs, members of the colored race, praying for a permanent injunction to restrain the Board of Education of the State of Tennessee, officials of such Board, and the president and registrar of Memphis State College, from refusing to admit plaintiffs to Memphis State College solely because of their race.[1] The facts are not in controversy. The findings of fact entered by the District Court are given in the margin.[2]

[1] The parties will be denominated as in the court below.

[2] 1. That the Tennessee State Board of Education intends promptly to comply with the decision and opinion of the Supreme Court of the United States in the segregation cases and, pursuant to such intention, and in good faith, has devised the plan hereinafter

All plaintiffs are residents of the City of Memphis, in the Western Division of the State of Tennessee, and also in

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referred to, after consultation with advisory groups representing various segments of affected interests.

2. There was no intention or effort upon the part of the said Board to evade or circumvent the decision of the Supreme Court, but, after full discussion, the Board concluded the plan proposed was the most feasible in view of the physical capacities and financial situation of the various schools under its jurisdiction.

3. Memphis State College at present has the largest enrollment in its history and its physical facilities would be inadequate, should unrestricted admission be decreed.

4. At present, this institution has not been allocated enough funds from the State upon which its existence depends and which constitutes the major portion of its financial support, to authorize unrestricted integration and to allow it to operate should such be done.

5. Memphis State College is located in the portion of the State in which the colored race maintains its highest density of population and is therefore subjected to the potential of a heavy enrollment from members of the colored race.

6. Memphis State College is a member of the State Association of Colleges whose rules require certain standards by all its members. The loss of membership in this association will result in students who take courses at Memphis State College being deprived of credit for work done in such college should they desire to transfer to another member of the association or other similar associations. Virtually all institutions of collegiate standing in the United States are members of this or similar associations. Memphis State College does not now and will not prior to July 1, 1957, have adequate finances to enable it to maintain its membership in this association should there be the increase in applications for instruction therein which very reasonably may flow from unrestricted admission. Due to its location and the high percentage of eligible colored students, a considerable increase in applications to it from qualified students of this race may be expected.

7. The Court further finds that since 1870 the State of Tennessee has pursued a course of segregated schools between the two races and that during this interval customs have arisen between the two races, which might be disturbed seriously by an abrupt abrogation thereof. The Court finds that a gradual plan of desegregation in its opinion offers greater possibility of eventual complete acceptance of the situation by members of both races than would an abrupt transition at present.

8. The Court also finds that the respondent members of the Board are proceeding with all deliberate speed in order to complete orderly and peaceful integration. The Court also finds that time is absolutely necessary to carry out in an effective manner the ruling of the Supreme Court.

the district served by Memphis State College, a public educational institution of the State of Tennessee. As to educational requirements it is conceded that plaintiffs are fully qualified for admission to the college and that they have been denied admission solely because of their color. It is the policy of the State of Tennessee to maintain Memphis State College for the education, exclusively, of white persons. This policy is required under Article 11, Section 12, of the Tennessee Constitution of 1870, the pertinent part of which reads as follows:

> " . . . No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school."

It also is required under Sections 11395 and 11396 of the Code of Tennessee which read as follows:

> "Unlawful for white and colored persons to attend same school.—It shall be unlawful for any school, academy, college, or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning.
>
> "Unlawful for teacher to allow such mixed attendance or to teach them in same class.—It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning, to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent, or procurement."

The complaint prayed that the District Court convene a three-judge district court under Title 28, U. S. C., Sec-

tions 2281 and 2284, to hear the case, but this application was refused. Plaintiffs contend that under the Federal Constitution, particularly the Fourteenth Amendment, the validity of the Tennessee segregation statutes and state constitution was directly involved and a three-judge court was therefore required. However, the gist of the controversy was the question of alleged discrimination under the Fourteenth Amendment. Moreover, the constitutional contention no longer presents a question of substance. It is essential to the jurisdiction of the federal courts in three-judge cases that a substantial federal question be presented. **Ex Parte Poresky**, 290 U. S. 30. The Supreme Court there pointed out that a federal question may be unsubstantial "because it is 'obviously without merit,' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject. . . .' " This is the precise situation here presented. The previous decisions of the Supreme Court, **Brown v. Board of Education**, 347 U. S. 483, and **Brown v. Board of Education**, 349 U. S. 294, have foreclosed the subject. As declared in the latter decision, all provisions of federal, state, or local law requiring or permitting discrimination on the ground of race or color in public educational institutions must yield to the principle that racial discrimination in public education is unconstitutional. The District Court correctly held that the invalidity of the Tennessee constitutional provisions and statutes providing for segregation is "patent" and that a three-judge court was not required. In accord with this conclusion are **Wichita Falls Junior College District v. Battle**, 204 Fed. (2d) 632 (C. A. 5), certiorari denied 347 U. S. 974, and the final decision in **Board of Supervisors, etc., v. Tureaud**, 228 Fed. (2d) 895 (C. A. 5). This case was heard en banc and six judges concurred in the conclusion that a hearing by a three-judge court was not required to decide a factual question of discrimination.

As the District Court had jurisdiction it properly proceeded with the trial. The principal issue was factual, namely, whether continuation of discrimination prohibited by the equal protection clause of the Fourteenth Amendment was contemplated by the proposed plan. The District Court decided that the plan devised by defendants for the integration of the races is in all respects fair and reasonable, and denied the injunction prayed for.

The defense to the action was based upon the ground that Memphis State College is not physically equipped to handle a freshman class in excess of 1,000 students, that if all persons qualified for such admission are admitted without restriction an overtaxation of the physical facilities now available will result, and that such an overtaxation of facilities will result in the school being deprived of its accredited standing and membership in the Southern Association of Colleges. Defendants also aver that Memphis State College is financed by appropriations made by the General Assembly of the State of Tennessee and has no other source of income except tuitions and other fees. They point out that the General Assembly, for the period of July 1, 1955, until July 1, 1957, has made appropriations which are completely inadequate if all the available students in Shelby County alone undertake to enroll in the college. Citing the decision of the Supreme Court, **Brown v. Board of Education**, 349 U. S. 294, that courts of equity in providing for desegregation in a systematic and effective manner may consider problems related to administration arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, the Board in a formal resolution has adopted the following program of transition to a desegregation basis:

"For the scholastic year 1955-1956, qualified negro students shall be admitted to do graduate work at Memphis State College, Middle Tennessee State College, East Tennessee State College and Austin Peay State College. During the said scholastic year, qualified white students shall be admitted to graduate classes of the Tennessee Agricultural and Industrial State University for Negroes at Nashville.

"For the scholastic year 1956-57, qualified negro students shall be admitted to the graduate classes and senior classes of Memphis State College, Middle Tennessee State College, East Tennessee State College, Austin Peay State College and Tennessee Polytechnic Institute at Cookeville. During the said scholastic year, qualified white students shall be admitted to graduate classes and senior classes of the Tennessee Agricultural and Industrial State University for Negroes at Nashville.

"For the scholastic year 1957-58, qualified negro students shall be admitted to the graduate, senior and junior classes of Memphis State College, Middle Tennessee State College, East Tennessee State College, Austin Peay State College and Tennessee Polytechnic Institute at Cookeville. During the said scholastic year, qualified white students shall be admitted to graduate, senior and junior classes of Tennessee Agricultural and Industrial State University for Negroes at Nashville.

"For the scholastic year 1958-59, qualified negro students shall be admitted to the graduate, senior, junior and sophomore classes of Memphis State College, Middle Tennessee State College, East Tennessee State College, Austin Peay State College and Tennessee Polytechnic Institute at Cookeville. During the said scholastic year, qualified white students

shall be admitted to graduate, senior, junior and sophomore classes of the Tennessee Agricultural and Industrial State University for Negroes at Nashville.

"For the scholastic year 1959-60, and thereafter, qualified negro students shall be admitted to the graduate, senior, junior, sophomore and freshmen classes of Memphis State College, Middle Tennessee State College, East Tennessee State College, Austin Peay State College and Tennessee Polytechnic Institute at Cookeville. During the said scholastic year, and thereafter, qualified white students shall be admitted to graduate, senior, junior, sophomore and freshmen classes of Tennessee Agricultural and Industrial State University for Negroes at Nashville."

Conceding that the Board was moved by proper motives in framing the proposed plan, a majority of the court thinks that in two respects the plan does not comply with the requirements of **Brown v. Board of Education,** 349 U. S. 294. Although the record shows that the physical facilities of Memphis State College would be inadequate if the student body in the undergraduate school were radically increased, this circumstance is not a valid defense to the action filed. The Board is authorized to establish a limit to the number of admissions, but the Board is not authorized to establish limitations based upon race or color. As stated by Chief Justice Hughes in **Missouri ex rel. Gaines v. Canada,** 305 U. S. 337, the Board is under an obligation to furnish the training "upon the basis of an equality of right." As held in **Sipuel v. Board of Regents of the University of Oklahoma,** 332 U. S. 631, the state must provide education for plaintiffs under the equal protection clause of the Fourteenth Amendment and must provide it as soon as it does to applicants in any other racial group. The record shows by uncontradicted evidence that 143 nonresidents of Ten-

nessee were enrolled in the Memphis State College for the fall semester of 1955; that 1079 nonresidents of Memphis were currently enrolled in the college. Of the out-of-state students currently enrolled approximately 50 were first-year students and approximately 30 were out-of-state second-year students. Giving full consideration to the fact that the Legislature has not allocated sufficient funds to the college to authorize unrestricted expansion of the student body, and that such unrestricted expansion might threaten the maintenance of accredited collegiate standing, the majority of the court thinks that defendants' adopted plan proposes to set up a system of admission to the college which does not recognize the rights of these plaintiffs. It would be feasible and legitimate for Memphis State College, in order to prevent overcrowding and loss of accreditation, to limit its substantial out-of-state membership, but the plan contemplates no such limitation. It would be legitimate to limit the size of the student body on a basis non-discriminatory to any group, or race, but the plan adopted postpones these qualified plaintiffs for five years in their admission to the freshman class, and expressly contemplates that white students who have registered later than these plaintiffs shall be admitted earlier. This is a clear discrimination between the races. It is another form of discrimination that plaintiffs may be compelled to seek education elsewhere in order to avoid discrimination and to secure a college education now without being deferred for several years. It is less expensive in time and money for these qualified applicants to attend a college within the district than to be compelled to seek college education elsewhere. An exclusion on account of race and color which forces an applicant to attend a distant school at greater expense is discriminatory, **Wichita Falls Junior College District v. Battle**, supra.

We are aware of the declarations of the Supreme Court that physical conditions of plant and transportation may

be considered in working out an orderly transition from a system of segregation to a system of desegregation. But the court also declared that this should be done with all deliberate speed. To deny entrance to these plaintiffs for five years, to place them at the bottom of the list without regard to the time of their application for entrance, seems to a majority court a noncompliance with the declaration of the Supreme Court. **Brown v. Board of Education**, supra. We think our conclusion is supported in principle by and accords with the late decisions. **Gray v. University of Tennessee**, 97 Fed. Supp. 463. In this case the university decided to admit the appellants as requested, after the District Court had held that the appellants were entitled to relief, and thereupon the case was dismissed as moot by the Supreme Court. **Gray v. Board of Trustees of the University of Tennessee**, 342 U. S. 517; **Bolling v. Sharpe**, 347 U. S. 497; **Lucy v. Adams, Dean of Admissions, University of Alabama**, 350 U. S. 1; **Willis v. Walker**, 136 Fed. Supp. 177. Cf. **Sipuel v. Board of Regents of The University of Oklahoma**, supra; **Sweatt v. Painter**, 339 U. S. 629; **McLaurin v. Oklahoma State Regents for Higher Education**, 339 U. S. 637; **McKissick v. Carmichael**, 187 Fed. (2d) 949 (C. A. 4), certiorari denied 341 U. S. 951.

The judgment of the District Court is reversed and the case is remanded for further proceedings in accordance with the majority opinion.

Miller, Circuit Judge, dissenting. The majority opinion suggests different ways in which the physical and financial difficulties involved in immediate integration might be overcome at Memphis State College, and accordingly rejects the plan which does not accomplish that result. That, to me, is not the issue in the case. Admittedly, there may be different solutions to the problem. But if the plan proposed by the school authorities, which

provides for partial elimination of segregation at the present time, and additional elimination in each succeeding year, and complete elimination over a period of five years, is a good-faith solution, even though requiring time, it is not to be rejected by the courts. The Supreme Court, in **Brown v. Board of Education**, 349 U. S. 294, stated the issue in pointing out that the school authorities "have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles" (page 299). The opinion further stated that the District Court can best perform this judicial appraisal.

The District Judge in exercising the judicial appraisal so delegated to him by the Supreme Court found as facts that there was no effort or intention on the part of the State Board of education to evade or circumvent the decision of the Supreme Court, that it had devised the proposed plan in **good faith** after consultation with advisory groups representing various segments of affected interests, that on account of the physical, financial and practical problems involved, which are given in detail in its findings, a gradual plan of desegregation offers greater possibility of eventual complete acceptance of the situation by members of both races than would an abrupt transition at present, and that time is absolutely necessary to carry out in an effective manner the ruling of the Supreme Court.

The majority opinion concedes that the facts are not in controversy. Unless the District Judge abused his discretion in approving the plan proposed to meet the problems presented by such a factual background, we are not authorized to reject the plan in order to substitute a different plan of our own. That there are problems, practical as well as physical and financial, can hardly be

denied. The District Judge, a long-time resident of Memphis, Tenn., and closely in touch with the local situation, is much better situated to understand, analyze and evaluate the problems than are we. As stated in **Brown v. Board of Education**, supra, at page 300, that while there is a duty upon the school authorities to make a prompt and reasonable start toward full compliance with its ruling, "Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner." The District Judge expressly found that time was absolutely necessary to carry out the ruling in an effective manner. I am of the opinion that there was no abuse of discretion on the part of the District Judge and that the judgment should be affirmed.

APPENDIX B.

Office of the Clerk
United States Court of Appeals
For the Sixth Circuit
Cincinnati 2, Ohio

Carl W. Reuss
Clerk

February 7, 1957.

Mr. J. F. Estes,
145 Beale Street,
Memphis, Tennessee

Mr. Robert L. Carter,
107 W. 43rd Street,
New York, N. Y.

Mr. Nat Tipton, Advocate General,
Supreme Court Building,
Nashville, Tennessee

Re: Ruth Booker, et al., v.
St. of Tennessee Board of
Education, et al., #12,775

Gentlemen:

The following order was entered in the above-entitled case today:

"The petition for rehearing is denied.

"Judge Miller is of the view that the petition should be granted.

"Approved for entry:

/s/ Florence E. Allen,
United States Circuit Judge."

Yours very truly,

Carl W. Reuss,
Clerk,

By Mary M. McAfee,
Deputy Clerk.

cc: Mr. H. T. Lockard,
Mr. B. L. Hooks,
Mr. A. W. Willis, Jr.

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APPENDIX

IN THE

United States Court of Appeals

For the Sixth Circuit

No. 12,775

RUTH BOOKER, An Infant, By Dovie Booker, Her Mother And Next Friend, NELLIE PEOPLES, An Infant, By Manie Peoples, Her Mother And Next Friend, MARDEST KNOWLES VAN HOOK, An Infant, By Mardest Harris, Her Mother And Next Friend, And ELIJAH NOEL, JOSEPH McGHEE, JR.,

Plaintiffs-Appellants,

VS.

STATE OF TENNESSEE BOARD OF EDUCATION, QUILL E. COPE, STATE COMMISSIONER OF EDUCATION AND CHAIRMAN STATE BOARD OF EDUCATION, ERNEST C. HALL, NORMAN FROST, EDWARD L. JENNINGS, W. R. LANDHUM, CHESTER PARHAM, FERDINAND POWELL, ROBERT P. WILLIAMS, J. HOWARD WARD, SAM WILSON, MEMBERS OF THE STATE BOARD OF EDUCATION OF TENNESSEE, J. M. SMITH, PRESIDENT OF MEMPHIS STATE COLLEGE, R. P. CLARK, REGISTRAR OF MEMPHIS STATE COLLEGE,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

Docket Entries

May	26, 1955—Filed $250.00 cost bond, U. S. F. & G. Surety
May	26, 1955—Filed Complaint
June	21, 1955—Filed answer of defendants

Docket Entries

September 26, 1955—Filed interrogatories to defendants J. M. Smith, Pres. of Memphis State College and R. P. Clark, Registrar of Memphis State College, in accordance with Rule 33

October 7, 1955—Filed motion for judgment on pleadings, and in the alternative motion for summary judgment for plaintiff

October 17, 1955—Filed answers of defendants to interrogatories

November 22, 1955—Filed final decree, application for permanent injunction denied, plan of State Board accepted, costs divided

November 22, 1955—Filed findings of fact and conclusions of law

December 2, 1955—Filed $250.00 appeal bond, H. T. Lockard, surety

December 2, 1955—Filed notice of appeal

December 20, 1955—Filed Court Reporter's transcript of proceedings

Complaint

(Filed May 26, 1955)

1. (a) The jurisdiction of this Court is invoked under Title 28, United States Code, section 1331. This action arises under the Fourteenth Amendment of the Constitution of the United States, section 1, and the Act of May 31, 1870, Chapter 114, section 16, 16 Stat. 144, (Title 8 United States Code, section 41), as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand ($3,000.00) Dollars.

(b) The jurisdiction of this Court is also invoked under Title 28, United States Code, section 1343. This action is authorized by the Act of April 20, 1871, Chapter 22, section 1, 17 Stat. 13, (Title 8, United States Code, section 43), to be commenced by any citizen of the United States or other person within the jurisdiction thereof to redress the deprivation, under color of a state law, statute, ordinance, regulation, custom or usage, of rights, privileges and immunities secured by the Fourteenth Amendment of the Constitution of the United States, section 1, and by the Act of May 31, 1870, Chapter 114, section 16, 16 Stat. 144, (Title 8, United States Code, section 41), providing for the equal rights of citizens and of all persons within the jurisdiction of the United States, as hereinafter more fully appears.

(c) The jurisdiction of this Court is also invoked under Title 28, United States Code, section 2281. This is an action for a permanent injunction restraining, upon the ground of unconstitutionality, the enforcement, operation and execution of provisions of the Constitution and stat-

utes of the State of Tennessee by restraining the action of defendants, officers of such State, in the enforcement and execution of such Constitutional provisions and statutes, as hereinafter more fully appears.

2. This action is a proceeding under Title 28, United States Code, sections 2201 and 2202, for a judgment declaring the rights and other legal relations of plaintiffs and all other Negro children eligible to attend Memphis State College at Shelby County, Tennessee, and demanding an injunction, for the purpose of determining and redressing questions and matters of actual controversy between the parties, to-wit:

(a) Whether Sections 11395, 11396 and 11397, Code of Tennessee and that portion of Section 12 of Article 11 of the Tennessee Constitution which makes it unlawful for white and colored persons to attend the same school violate the Fourteenth Amendment to the United States Constitution and whether the exclusion of plaintiffs from Memphis State College, Shelby County, Tennessee, pursuant to these statutes and constitutional provisions and any other law, custom, practice or usage violates the Fourteenth Amendment to the Constitution of the United States.

3. Plaintiffs bring this action pursuant to Rule 23 (a)(3) of the Federal Rules of Civil Procedure for themselves and on behalf of all other Negroes similarly situated, who are so numerous as to make it impracticable to bring them all before the court and who seek a common relief based upon common questions of law and fact.

4. Plaintiffs are Negroes and are citizens of the United States, State of Tennessee, and are residents of and domi-

ciled in the City of Memphis, Shelby County, Western Division of the State of Tennessee. They all can satisfy all requirements for admission to Memphis State College, City of Memphis, Shelby County. Adult plaintiffs not applicants, are either parents or guardians of the infant plaintiffs who are applicants.

5. The State of Tennessee has declared public education a State function. The Constitution of Tennessee, Article XI, Section 12, provides:

> "Knowledge, learning and virtue, being essential to the preservation of republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the State being highly conducive to the promotion of this end, it shall be the duty of the General Assembly, in all future periods of this Government to cherish literature and science."

Pursuant to this mandate the Legislature of Tennessee has established a system of free State Colleges in the State of Tennessee according to a plan set out in an Article of the General Assembly of Tennessee of 1909, and supplements and amendments thereto. The establishment, maintenance and administration of the State Colleges of Tennessee is vested in a State Board of Education, and a Commissioner of Education.

6. Defendant, State Board of Education exists pursuant to the Constitution and laws of the State of Tennessee as an administrative department of the State of Tennessee, discharging governmental functions and is by law an agency of the State of Tennessee. Defendant, Quill E. Cope, is

the State Commissioner of Education and Chairman of the State Board of Education, and holds office pursuant to the Constitution and laws of the State of Tennessee, as an administrative officer of the State Department of Education of the State of Tennessee. Defendant, J. M. Smith, is the president of Memphis State College, and has immediate control of its operation. Defendant, R. P. Clark is the Registrar of Memphis State College. Defendants Fred S. Elliot, Norman Frost, Edward L. Jennings, R. R. Landrum, Chester Parham, Ferdinand Powell, Bartow Strang, W. R. Webb, and Sam Wilson are members of and constitute the State Board of Education of the State of Tennessee.

7. The State Colleges of Tennessee are under the control and supervision of defendants, State Board of Education and Commissioner Quill E. Cope, acting as an administrative department or division and as an agent of the State of Tennessee. Said defendant, State Board of Education, is under a duty to enforce the school laws of the State of Tennessee; to maintain an efficient system of State Colleges in each grand Division of Tennessee; to determine the studies to be pursued, the methods of teaching, and to establish such colleges as may be determined by the legislature. Memphis State College is the only State College established in West Tennessee.

8. Defendant, Board of Education of Tennessee maintains in Shelby County, Tennessee, Memphis State College for the education, convenience and use of white persons of West Tennessee and Memphis exclusively. This college provides space and facilities for academic, commercial,

scientific and vocational instruction; for cultural and artistic expression; and for athletic and physical development. All of these facilities are available to any white person resident in Shelby County, Tennessee, but denied to plaintiffs applicant and all other persons similarly situated.

9. At the beginning of the Fall Term, 1954, three of the infant plaintiffs and two adults made application for admission to Memphis State College, the only State College maintained by defendants in Memphis, Shelby County, Tennessee, but were refused admission solely on account of their race and color. Defendants require Negro applicants to attend A & I State College, Nashville, Tennessee.

10. The defendants rely on the following provisions of the Tennessee Constitution and statutes which read as follows:

Constitution of 1870, Art. 11, Sec. 12,

> ". . . No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school. . . ."

Code of Tennessee Sec. 11395 6888a37.

> Unlawful for white and colored persons to attend same school.—It shall be unlawful for any school, academy, college or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning. (1901, ch. 7, sec. 1.)
>
> 11396 6888a38. Unlawful for teacher to allow such mixed attendance or to teach them in same

class.—It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning, to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent, or procurement. (Ib., sec. 2.)

11397 6888a39. Violation is a misdemeanor; fine and imprisonment.—Any person violating any of the provisions of this article, shall be guilty of a misdemeanor, and, upon conviction, shall be fined for each offense fifty dollars, and imprisonment not less than thirty days nor more than six months. (Ib., sec. 4, Modified.)

11. The plaintiffs and all other Negroes in West Tennessee and Shelby County, Tennessee are thereby deprived of their rights guaranteed by the Constitution and laws of the United States.

12. Plaintiffs and those similarly situated and affected, on whose behalf this suit is brought, are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the acts herein complained of. They have no plain, adequate or complete remedy to redress the wrongs and illegal acts herein complained of other than this suit for a declaration of rights and an injunction. Any other remedy to which plaintiffs and those similarly situated could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would in-

volve multiplicity of suits, cause further irreparable injury and occasion damage, vexation and inconvenience, not only to the plaintiffs and those similarly situated, but to defendants as governmental agencies.

13. There is between the parties an actual controversy as hereinbefore set forth.

WHEREFORE, PLAINTIFFS respectfully pray the Court that upon the filing of this complaint, the Court convene a Three-Judge District Court as required by Title 28, United States Code, Sections 2281 and 2284; the Court advance this cause on the docket and order a speedy hearing of this action according to law, and that upon such hearings:

The Court adjudge, decree and declare the rights and legal relations of the parties to the subject matter herein controversy in order that such declaration shall have the force and effect of a final judgment or decree.

The court entered a judgment or decree declaring that Sections 11395, 11396 and 11397 and any customs, practices and usages pursuant to which plaintiffs are excluded from Memphis State College solely because of race, violate the Fourteenth Amendment to the United States Constitution.

This court issued a permanent injunction forever restraining and enjoining defendants and each of them from refusing to admit plaintiffs to Memphis State College solely because of their race.

Plaintiffs further pray that the Court will allow them their costs herein and such further, other or additional relief as may appear to the Court to be equitable and just.

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Counsel for Plaintiffs

Answer of Defendants

(Filed June 21, 1955)

These defendants for answer to the complaint filed against them in the above styled cause say:

I

They have no knowledge of the qualifications of the plaintiffs for admission to Memphis State College and, therefore, require strict proof thereof.

II

They deny that the statutes and constitutional provision of the State of Tennessee quoted in the complaint have ever been adjudicated invalid as being in conflict with the Constitution of the United States and they deny such invalidity.

III

They aver that they as the State Board of Education have undertaken in good faith to comply with the decree of the Supreme Court of the United States requiring desegregation by adopting a resolution, copy of which is attached hereto and made Exhibit A but need not be copied, which resolution undertakes to provide for such desegregation over a relatively brief period of time. They aver that for more than 100 years segregation in education has been followed in the public schools of this State and likewise at the collegiate level. They propose to comply so far as possible with the decisions of the Supreme Court of the United States requiring such desegregation but they would show to the Court that after so long a period of segregation, an abrupt effort to end the same will produce many problems. Recognizing the existence of these problems,

these defendants comprising the State Board of Education have concluded that the most feasible approach to the problem, so far as the institutions under their control are concerned, is to first undertake to inaugurate it among the more mature students. They aver that the Freshman and Sophomore classes of both races are to a certain degree adolescent and in the main unrestrained in their thought and action. To the contrary, they aver that students at the graduate level and in the Senior class generally are much more mature and that they firmly believe that by undertaking to desegregate among those more mature students, there will exist much more tolerance and understanding and that as they proceed with this plan, the action of the higher classes in accepting the same will set a beneficial example to those in the lower classes and prepare them for its acceptance when the time shall arrive to put such system in complete operation in all classes. Likewise, since as a general rule the graduate classes and Senior classes are not as numerous as those of the Freshmen and Sophomore years, more abundant physical facilities will exist for the education of all students who may seek admission to these higher level classes.

By the decree of the Supreme Court of the United States District Judges of the United States were vested with jurisdiction to examine and to adopt plans for desegregation of the white and colored races in education and these defendants submit this plan to this Court as governing the institutions over which they have jurisdiction as the most feasible plan which could be devised at the present time without causing a vast amount of friction between the two races and as looking toward public acceptance of desegregation and thus promoting the public welfare.

IV

So far as the application of the plaintiffs for admission to Memphis State College be concerned, a number of obstacles present themselves which must be solved before such applications can be granted. Statistics disclose that annually from the high schools heretofore operated exclusively for the benefit of the colored race in Shelby County, from 500 to 750 students graduate annually. In the high schools operated heretofore exclusively for the white race, the number of graduates amounts to at least double those of the negro high school thus presenting a potential graduate body of more than 2,000 students, all of whom possibly can make application for admission to Memphis State College.

Memphis State College is not physically equipped to handle a Freshmen class of entrants in excess of 1000 students. To admit unrestrictedly all persons qualified for such admission will result in an over-taxation of the physical facilities now available at such school for the Freshmen class. Such over-taxation of facilities will result in this school being deprived of its accredited standing and membership in the Southern Association of colleges, without which no educational institution of collegiate grade can maintain any degree of standards or prestige in the educational world. Likewise, Memphis State College derives its funds from appropriations of the General Assembly of the State of Tennessee and possesses nc source of income other than such appropriations plus the tuition and other fees charged students. The General Assembly of the State of Tennessee met in January 1955, and adjourned since then in April, 1955, and has made appropriations for the operation of Memphis State College in an amount completely inadequate to operate the same should all the available students in Shelby County alone undertake to enroll

therein. The General Assembly will not meet again in regular session until January 1957, and for the period of July 1, 1955, until July 1, 1957, the funds available for such institution will be completely inadequate to maintain such institution at its normal collegiate level and in addition thereto, the physical facilities of such colleges are totally inadequate to meet the demands to be made upon it if there be unrestricted admission into it by this Court.

The General Assembly of Tennessee which is the source of the overwhelming majority of funds for educational purposes prior to the decision of the Supreme Court placing plans for desegregation under the authority of District Courts of the United States, had made appropriations for the Memphis State College and it also made appropriations for Tennessee Agricultural and Industrial College, heretofore maintained exclusively for students of collegiate level of the colored race and as above stated, these appropriations will remain constant until July 1, 1957, in the absence of an extra session of the Tennessee General Assembly which appears most unlikely, and these defendants call this to the attention of the Court in passing upon the feasibility of the plan for desegregation submitted by them. The laws of Tennessee make no provision whatsoever for the transfer of funds appropriated for the use of one institution of collegiate level to another such institution of the same degree even if both of such institutions be under the jurisdiction and control of these defendants and unless a plan be approved which takes into consideration the financial ability of all of these institutions until July 1, 1957, a result may be attained which will cause one institution to suffer in training as well as prestige for lack of abundant funds, while leaving a surplus to the institution for which appropriation has been made for the education of the colored race at the college level.

And now having fully answered, these defendants pray to be hence dismissed.

.....
Attorney General

.....
Solicitor General

.....
Advocate General

I hereby certify that copy of this answer has been mailed to J. F. Estes, 145 Beale Avenue, Memphis, Tennessee, he being the party designed for service of pleadings by defendants.

Exhibit A, Annexed to Answer

(Resolution of the State Board of Education)

WHEREAS, the Supreme Court of the United States, in its opinion in the Segregation Cases declaring that racial segregation in public education is unconstitutional, established the following principles for the guidance of school authorities and courts in carrying out the opinion of the Court:

> ". . . Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities con-

stitutes good faith implementation of the governing constitutional principles. . . ."

". . . In fashioning and effectuating the decree, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases will call for the exercise of these traditional attributes of equity power" . . . "To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. . . ."

". . . The Courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non racial basis and revision of local laws and regulations which may be necessary in solving the foregoing problems . . ." and,

---

WHEREAS, all of the problems and difficulties recognized in said opinion as warranting a gradual transition to a desegregated basis, together with others not mentioned, exist with respect to all state colleges, institutes and normal schools under the jurisdiction of the State Board of Education:

Exhibit A, Annexed to Answer

NOW, THEREFORE, Be it resolved by the State Board of Education of Tennessee, that subject to special circumstances, the following program of transition to a desegregated basis is hereby adopted for the government of all of said colleges, institutes and normal schools:

For the scholastic year 1955-56, qualified negro students shall be admitted to do graduate work at Memphis State College, Middle Tennessee State College, East Tennessee State College and Austin Peay State College. During the said scholastic year, qualified white students shall be admitted to graduate classes of the Tennessee Agricultural and Industrial State University for Negroes at Nashville.

For the scholastic year 1956-57, qualified negro students shall be admitted to the graduate classes and senior classes of Memphis State College, Middle Tennessee State College, East Tennessee State College, Austin Peay State College and Tennessee Polytechnic Institute at Cookeville. During the said scholastic year, qualified white students shall be admitted to graduate classes and senior classes of the Tennessee Agricultural and Industrial State University for Negroes at Nashville.

For the scholastic year 1957-58; qualified negro students shall be admitted to the graduate, senior and junior classes of Memphis State College, Middle Tennessee State College, East Tennessee State College, Austin Peay State College and Tennessee Polytechnic Institute at Cookeville. During the said scholastic year, qualified white students shall be admitted to graduate, senior and junior classes of Tennessee Agricultural and Industrial State University for Negroes at Nashville.

For the scholastic year 1958-59, qualified negro students shall be admitted to the graduate, senior, junior and sophomore classes of Memphis State College, Middle Tennessee State College, East Tennessee State College, Austin

Peay State College and Tennessee Polytechnic Institute at Cookeville. During the said scholastic year, qualified white students shall be admitted to graduate, senior, junior and sophomore classes of the Tennessee Agricultural and Industrial State University for Negroes at Nashville.

For the scholastic year 1959-1960, and thereafter, qualified negro students shall be admitted to the graduate, senior, junior, sophomore and freshmen classes of Memphis State College, Middle Tennessee State College, East Tennessee State College, Austin Peay State College and Tennessee Polytechnic Institute at Cookeville. During the said scholastic year, and thereafter, qualified white students shall be admitted to graduate, senior, junior, sophomore and freshmen classes of Tennessee Agricultural and Industrial State University for Negroes at Nashville.

BE IT FURTHER RESOLVED, That this program of transition to a desegregated basis for the colleges under the jurisdiction of this Board shall be inoperative until:

1. The provisions of the Constitution and statutes of Tennessee requiring segregated public education be held invalid as contrary to the Constitution of the United States in a legal proceeding directed to that end; and,

2. It is determined that the opinions of the Supreme Court of the United States in the Segregation Cases apply not only to public grade school education but to state Colleges and universities in Tennessee; and,

3. Any other available grounds of defense which will manifest the right of the sovereign State of Tennessee to arrange and provide free education for its citizens on its own terms and conditions, provided, only that all are treated fairly and equally, have been presented in court.

Interrogatories

(Filed September 26, 1955)

The plaintiffs in the above-entitled cause, by their undersigned attorneys, request that defendants J. M. Smith, President of Memphis State College, and P. P. Clark, Registrar of Memphis State College, answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

1. What is the total present enrollment at the College?
2. How many of these students are pursuing graduate studies?
3. What is the enrollment in the School of Arts and Sciences; School of Business Administration and the School of Education?
4. Do these figures include those students pursuing courses leading to a general college degree as listed on pages 167-168 of the 1955-56 catalog issue of the College? If this is a separate division or school, what is the enrollment of students in this division or school?
5. What is the highest enrollment of students over the last ten years? Please specify with respect to each of the main divisions or schools of the College. (See 3 and 4 above)
6. How many non-residents of Tennessee are presently enrolled in the College? What was the number of these non-residents enrolled during the 1954-55 school term; the 1953-54 school term?
7. How many non-residents of Memphis are now enrolled in the College? How many such non-residents were enrolled during the 1954-55 school term; 1953-54 school term?

Interrogatories

8. How many out-of-state first-year students are presently enrolled and attending the college? Please break this down with respect to the respective schools in the College.

9. How many such second-year students are presently attending College? Please break this down as above.

PLEASE TAKE NOTICE that a copy of such answer must be served upon the undersigned within fifteen (15) days after the service of these Interrogatories.

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Counsel for Plaintiffs

Answers to Interrogatories

(Filed October 17, 1955)

Now come defendants, J. M. Smith, President of Memphis State College, and R. P. Clark, Registrar of Memphis State College, and being first duly sworn, do make answer to the interrogatories Nos. 1 through 9, directed to them by the plaintiffs through their attorneys in accordance with Rule 33 of the Federal Rules of Civil Procedure, as follows:

1. 3532
2. 325
3. School of Arts and Sciences—1451; School of Business Administration—930; School of Education—750.
4. General college—76.
5. 3532. Our present enrollment in all schools exceeds any year's previous enrollment.
6. 143 for the fall semester of 1955; 112 was the average for the two semesters of the school year of 1954-55; 65 was the average for the three quarters of the school year of 1953-54.
7. There are 1079 non-residents of Memphis currently enrolled. There were 947 non-residents of Memphis enrolled during the school year of 1954-55; there were 796 non-residents of Memphis enrolled in 1953-54.
8. There are approximately 50 first-year out-of-state students currently enrolled, distributed as follows: 27 in the school of Arts and Sciences; 13 in the school of Business Administration and 10 in the School of Education.

Answers to Interrogatories

9. There are approximately 30 out-of-state second-year students currently enrolled, distributed as follows: 15 in the School of Arts and Sciences; 8 in the School of Business Administration and 7 in the School of Education.

Answers to interrogatories 8 and 9 do not include Korean War Veterans, this, for the reason that Korean War Veterans, regardless of their domicile at the time of registration, have been registered as residents of Tennessee under the policy of the State Board of Education and the Comptroller's Office. It would be practically impossible to determine the per cent of out-of-state Students among Korean War Veterans since nothing appears of record in connection with their registration from which this information can be gotten.

/s/ .....
President

/s/ .....
Registrar
Defendants.

Motion for Judgment on the Pleadings and, in the Alternative, Motion for Summary Judgment for the Plaintiffs

(Filed October 7, 1955)

1. Plaintiffs move the Court to enter judgment for plaintiffs on the pleadings in the above-entitled action on the ground that the defendants have failed to state a legal defense to plaintiffs' claim for relief prayed for in their complaint.

2. In the alternative, plaintiffs move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter judgment for the plaintiffs for the relief demanded in their complaint on the ground that there is no genuine issue as to any material fact in this action, and that plaintiffs are entitled to judgment as a matter of law as appears in the pleadings, answer and exhibits filed in the above-entitled cause.

H. T. Lockard
322½ Beale Avenue
Memphis, Tennessee
Counsel for Plaintiffs

Dated: October 7, 1955.

Excerpts From Testimony

[25] DEFENDANTS' PROOF

Thereupon the Defendants, in support of the issues on their part, introduced evidence as follows, to-wit:

DR. QUILL E. COPE, the first witness, having been first duly sworn, testified as follows:

Mr. Tipton: Shall I proceed, Your Honor?

Direct examination by Mr. Tipton:

Q. This is Mr. Quill Cope? A. Yes.

Q. Dr. Quill Cope. Excuse me. Doctor, where are you from? A. Nashville, Tennessee.

Q. Do you have any official position with the State of Tennessee? A. Commissioner of Education; Chairman State Board of Education.

[26] Q. How long have you been such Commissioner? A. Since January '53.

Q. I believe you state you are also Chairman of the State Board of Education? A. That is correct.

Q. Doctor, what are your functions with the State Board of Education in connection with the institutions of higher learning?

Attorney Looby: We can't hear. We are having difficulty in hearing down at the other side.

The Court: I tell you, the acoustics in this room are pretty bad. Maybe you can pull your chairs over a little bit here.

And raise your voice, if you can, Doctor.

A. Yes, sir.

Mr. Tipton: I will try to raise my voice, too. I didn't mean to holler.

Q. Doctor, I believe you stated—, you stated you were Chairman. What are the functions of the State Board of Education in connection with colleges of the State of the type of Memphis State College? [27] A. The State Board has the responsibility for the general regulations, governing the policy making regarding those institutions, admission policies, and overall admission policies, not detailed admission policies,—matters of that type.

Q. Doctor, as such Commissioner of Education, do you have in your possession statistics that have been gathered by the Department in connection with the various educational functions and facilities? A. I have some, yes, sir.

Q. I will ask you this, Doctor, if a survey has been made under the auspices of your Department there with respect to the number of negro graduates of high schools who later went to colleges of higher learning in Tennessee? A. The Department made such a survey, I would say a spot check of counties in West Tennessee, this fall. We did not get complete return, but we did make such a study, sent out questionnaires, we did make such a study.

Q. What percentage of high school graduates did your study reveal attended college?

[28] Attorney Looby: I object to that, if your Honor please, if he is going to testify from that study, I would like to know first who made the survey. It may have been made by anybody, not saying it is so, but he ought to at least state who made the survey.

The Court: Well, let him tell us a little more about it, if he is to testify about it.

Q. Was it made under the authority of your Department? A. Yes, sir.

Q. Were you the active—I don't mean the active, but did you have overall supervision of such survey and the way it was made under your Department? A. Yes, sir.

Q. State whether or not, Doctor, it was made by employees of your Department. A. Yes, sir, I asked Mr. Turner, who is a member of our Department to gather such information for me.

Q. Who is Mr. Turner? A. Well—

[29] Q. And what office does he hold? A. He is Coordinator of Instruction in the Department of Education.

Q. As such Coordinator, does he have any functions in connection with colored schools? A. Well, for a number of years he has been the Director of Negro Education, and he has had responsibility for working with that program.

Q. I believe you said that he was in charge of that survey? A. Yes, sir.

Q. Now, then, Doctor, under those circumstances, what percentage of—

Attorney Looby: Well, if your Honor please, Mr. Turner is the best witness there. I saw Mr. Turner in the courtroom this morning, and I think Mr. Turner is the best witness as to what he found.

The Court: The witness testifies that this survey was made under his direction and under his supervision, in effect.

Mr. Tipton: That is correct.

[30] The Court: And, if I understood—

Attorney Looby: I understood he said under Mr. Turner, under Mr. Turner.

The Court: Well, clarify that for us. Was it made under your supervision?

A. I asked Mr. Turner to get that information for me. Now, how he got that information, I am not prepared to state, the details. I assume that he wrote the principals of various schools and asked them how many of their graduates attended college.

The Court: Well, is he a witness here today?

Mr. Tipton: He is going to be a witness, if your Honor please.

Let me do this. Let me inquire of the witness, subject to it being confirmed, or rather made relevant and competent by testimony of Mr. Turner later on. I don't want to have to bring the witness back to the stand.

The Court: Well, I take it there is no objection to that procedure.

Mr. Tipton: I don't want to have to [31] bring the witness back to the stand.

Attorney Carter: Your Honor, we have a much more fundamental question about the line of testimony; just don't know how it is relevant to the issues before us, the fact that how many negroes were interested in going to school, and so forth. We have five plaintiffs here involved in going to Memphis State College, who represent a class of people. I don't understand what the relevancy is.

The Court: Well—

Mr. Tipton: I can state in a moment what the relevancy is. We set up in our answer there one of the reasons for adoption of this plan, the present facilities of this school are at present overtaxed. What we want to show is the potential if this plan be not adopted there. Under that theory, it strikes me this testimony is relevant.

The Court: The Court thinks so, under a recent Supreme Court opinion. There [32] is right considerable said about the administrative side of this thing, and it is along that line that this proof is offered.

Mr. Tipton: Yes, sir.

The Court: And if I get it, the witness Turner, who actually made the survey, and who is in better position to testify about it, is a witness here today.

Mr. Tipton: Yes, sir.

The Court: —and will testify, according to respondents' counsel, and I see no objection to this, the witness on the stand, testifying in generalities about the matter. And I assume that is as far as he proposes to go.

Mr. Tipton: That is as far as he proposes to go.

The Court: So the Court will permit him in this limited way, then, to go ahead with his testimony.

Q. Doctor, what was the result of that survey, the percentage figures as finally communicated to [33] you, and being made under your supervision? A. Approximately twenty-seven percent. I took the number shown by the schools as graduates, and the ones turned over to me—the figure was not figured by the group—and the number attend-college this year, arrived at the figure twenty-seven percent, approximately, of graduates entered some institution of higher learning.

Q. Do I gather from you that that survey as reported to you showed that twenty-seven percent of all negro high school graduates eventually entered some institution of higher learning? A. Not all, only the ones that reported.

Q. The figure, that was the result of your spot check, then, showed that? A. That is correct.

Q. Dr. Cope, as Commissioner of Education, is the scholastic population taken under your supervision, the scholastic population of the state? A. Yes, sir.

The Court: What was that question? I didn't get it.

[34] Mr. Tipton: I asked him, as Commissioner of Education, if the scholastic population of the state was taken under his supervision.

Q. Does that scholastic population census, Doctor, reveal the number of colored school pupils, as well as the number of white school pupils, both elementary and high schools? A. Yes, sir.

Q. Dr. Cope, I take it that you are familiar with the geography of the state, and know the counties that constitute West Tennessee, is that correct? A. Yes, sir.

Q. Have you made some—I will put it this way—have you broken down into percentages the scholastic population as divided between white and colored in the West Tennessee counties, particularly surrounding Shelby County, as well as Shelby County—the area from which Memphis State would most likely draw its student body? A. I have. I seem to have misplaced it. I had it when I started up here. It must be in my brief case, it is not in the folder.

[35] Mr. Tipton: We take it the witness may refer to his memorandum, if your Honor please.

The Court: Yes, sir, he may refresh his memory from any memorandum he has.

Q. Have you found it? A. I don't have it.
Q. Sir? A. I can't find it.
Q. Look through some of these, can you?

Does Mr. Turner possibly have it? A. He prepared this for me, and we had it back here this morning.

Mr. Tipton: Well, I will pass to something else, if your Honor please, and then get back to it. That is all.

Q. Doctor, as Commissioner of Education there, have you participated actively or otherwise in conferences during the sessions of the Legislature? A. Yes, sir.

Q. By the way, where are the funds for the operation of institutions of higher learning in this state derived? [36] A. They are derived from the general funds of the state and from specific levies which are levied for education, specifically the sales tax and tobacco tax.

Q. Coming a little closer home there, I don't think this question will be a leading question—you can answer it yes or no.

Does the General Assembly make specific appropriations for each institution of higher learning? A. Yes, sir.

Q. What other sources of revenue besides that appropriation at the hands of the Legislature do these institutions at the college level have? A. Admission fees charged to the student.

Q. Do you have any idea generally how the admission fees compare to the legislative appropriation in amount? Can you give us just an estimate? I know it will be just a speculation on your part. Do they form any appreciable part of it? A. I will say close to half.

Q. The admission fees do? A. Yes, a little less than half of it.

Q. Doctor, what is the attitude— [37] A. (Continuing) —May I correct that, sir, to say that included dormitory income and cafeteria income and other things which is all

not income, which I would call expendable receipts—approximately half.

Q. Doctor, I am trying to get scholastic income from admission fees only; not talking about dormitory income, other income there.

Do you have any idea what that would run? A. Percentage-wise, right off hand, I could not.

Q. Has there been discussion whatsoever of—

Well, I will go on to this subject before we get back. We have found the missing document, if your Honor please.

In your opinion, what effect will unbridled—I will call it that for want of a better term—integration have—

Attorney Looby: I object to that, if your Honor please. There is no qualification had for this witness to give this opinion. And, after all, that is a matter for the Court to decide as to whether or not, based on the line of testimony he is giving out, as whether [38] it would be compliance with the Supreme Court decision, is my thought.

The Court: What is it you are asking him to give his opinion on?

Mr. Tipton: I will do this, if the Court please, I will qualify him further.

What I was asking him, the effect of abrupt integration, what effect it would have upon the appropriation his Department would be able to get for the additional that he stated there. I want to show he is familiar with this. He has worked with the Legislature, contacted members of the committees, and all that sort of thing, would be in a position to testify to that, and what effect it would have on his Department.

Attorney Looby: I further object to this evidence. There is no indiscriminate integration here.

The application of five students for admission. That question is assuming the fact that there is going to be—if there are those applicants, negro [39] applicants—and as to what the effect will be, because there is no such fact before the Court.

The Court: Well, the respondents have set up the plan, and they are proposing that as a plan within the framework of the recent edict of the Supreme Court. Among other things, it is stated in that plan that this particular college gets its financial assistance from the Legislature, and General Tipton is introducing proof along that line to show, as I get it here, now, what would happen if colored students are permitted to enter this particular school at this time in numbers on an unrestricted basis.

Is that what you have in mind?

Mr. Tipton: That is right, is what I have in mind exactly, if your Honor please.

The Court: So—

Mr. Tipton: And since the Supreme Court in its latest decision back in May has ruled finances, the physical facilities, or [40] things of that sort, are relative facts to be considered in the submission of a plan there, it struck me it was complying to show his views as to the availability of finances.

The Court: I will let him develop that argument on it.

Attorney Looby: Your Honor, what we are objecting to is not as to the effect if these five were admitted, but it is assuming, and then asking upon the assumption that there is an indiscriminate number of applications from colored students.

The Court: I will overrule the objection.

Q. Doctor, I will further qualify you there.

Have you had considerable to do with the obtaining of appropriations for education, both higher and elementary there, from the '53 and '55 Legislatures? A. Yes, sir, I have worked with the Legislative Committee, with the Governor, and others, to get appropriations.

Q. Have you contacted the individual Legislators? A. I have.

[41] Q. Have you likewise been in contact with the body known as the Legislative Council? A. Yes, sir.

Q. Does that body, to some degree, recommend appropriations or not? A. It did, sir, prior to the '55 Legislature. They have certain recommendations that they make.

Q. Now, then, with that knowledge and background, I think you can probably qualify as an expert now.

What effect would unrestricted integration have upon the legislative appropriation at the present time?

Attorney Looby: Now, if your Honor please, I don't see how he can qualify now to tell—

Mr. Tipton: —In your opinion. I am asking what his opinion is, to tell his opinion.

Attorney Looby: How can this witness qualify as an expert to tell what the Legislature will do, when he does not even know who the members of the Legislature, the [42] next Legislature will be?

The Court: Well, as the matter was stated in the answer, appropriations for the biennium have already been made, and they were made some several months ago.

Attorney Looby: Yes, sir, but he is stating—

The Court (Continuing): —And it is stated that the Legislature will not convene before January, 1957.

Attorney: But this witness does not—

The Court: Just a moment. The witness has testified that as Superintendent of Education in this State he has had contacts with the Legislature, the Governor, and the Legislative Council, I believe he says, looking to the finances of not only this school but other similar schools in the state, and that money has been provided for the operation of these schools for this biennium.

Is that what you are saying at this time, Doctor?

[43] A. Yes, sir.

The Court: Now, that money, that is, the appropriation for these purposes, is that controlled to some extent by the number of students who enter these schools? I take it that is what you are getting at.

Mr. Tipton: Getting at that, and getting at the fact that these schools can't operate beyond their present biennium and without at least the appropriation to the same extent as is now made by law, and perhaps more, and I am getting at with him the probability of a decrease in that appropriation if unrestricted integration be adopted, if this plan isn't adopted.

Attorney Looby: Now, if your Honor please—

The Court: All right, now, I will hear you. With that elucidation of the matter, do you still say that this is incompetent, this testimony?

Attorney Looby: If your Honor please, [44] with respect to past appropriations, the appropriation is ready to be made for the present biennium.

The Court: I did not get you there.

Attorney Looby: With respect to the appropriations, they are ready to be made. And as to the wit-

ness' experience with the Legislators, I have no exception to his testimony, but the testimony now is intended to get from the witness his opinion as to what future Legislatures will do if there is indiscriminate admission. Now, I am saying he does not know.

The Court: I don't know that counsel is inquiring as to what a future Legislature might do.

Are you at this time—

Mr. Tipton: I was making this inquiry, after qualifying him as an expert, I think—in his opinion, what would be the effect on ability to get appropriations for educational purposes. By this, if your Honor [45] please, I am getting his views, trying to develop his views on that, if the Court please, whether he would have much more trouble getting more or less appropriation for the coming years if unrestricted integration were developed.

The Court: Well, that may be competent at some later stage of the proceeding. I doubt if his opinion on that would be proper at this time.

Mr. Tipton: I will ask this further question, then.

Q. Doctor, did you participate in the formation of the plan that is here being offered to be approved by the Court? A. Yes, sir.

Q. Did the question or possibility of a decrease in future educational appropriations enter into the consideration and determination or development of this plan? A. I think that was one factor that was discussed.

Q. After the first decision in the segregation [46] cases there, but prior to the most recent one there, did you contact any members of the Legislative Council, the then Legislative Council, with respect to appropriations for

educational purposes? A. I talked to individual members, yes, numerous times.

Q. Are some of those members that you talked to then still members of the Legislative Council? A. Yes, sir.

The Court: Is the Legislative Council, for the benefit of the Court, made up of members of the Legislature?

Mr. Tipton: Members of the Legislature, your Honor—beg your pardon.

The Court (Continuing): —And they are operating while the Legislature is not in session?

Mr. Tipton: They operate while—sort of, I might say this, not exactly a steering committee, but they are sort of a committee that formulates what they want to do, or what they are going to recommend.

[47] The Court: They get up programs—

Mr. Tipton: They get up the program.

The Court (Continuing): —For the coming Legislature, I believe, usually—I believe that is the purpose of it.

Mr. Tipton: Yes, sir, they get up the program for the coming Legislature.

Q. Now, then I am going to ask a question, and don't answer it, Doctor, until counsel has had an opportunity to object there.

What was the attitude of members of the Legislative Council whom you contacted with reference to the increase in appropriations if unrestricted integration be adopted?

And I will let counsel object to that.

Attorney Looby: If your Honor please, that is so objectionable on its face that even counsel recog-

nizes it. This witness can't testify as to what is in the mind of somebody who may recommend something to the Legislature to which he may or may not be a member. If your Honor please, just how that [48] could be competent, I can't see.

The Court: Well, I can see where it would be objectionable if the witness undertook to go too far in that way, but I will ask him this question. The Court will ask this question.

Was that a matter which concerned the members of the Legislative Council?

A. This was not an official meeting of the Legislative Council. This was a discussion at which several individual members of the Council were present, the members of the Legislature.

The Court: That was an angle on the overall picture concerning which they were interested or concerned, would you say?

A. I would say so, yes, sir.

The Court: And I believe you did testify that that was a matter which was discussed before the Board, at the State Board, is that what you say?

A. I wouldn't say that that was discussed before the State Board. It was discussed, the matter of [49] formulating a plan for consideration of the State Board.

The Court: I believe that is as far as you can go on that, Mr. Tipton.

Mr. Tipton: All right.

Q. Now, then, Doctor, we have discovered the missing memorandum there.

Will you take it, then, to him, Mr. Marshal?

Getting back to the scholastic population, Doctor, did you make a memorandum showing percentages in the various West Tennessee counties? A. Yes, sir.

Q. Is Memphis State College situated in Shelby County? A. That is correct.

Q. What is the ratio of scholastic population of Shelby County, the Negro scholastic population of Shelby County to the total? A. 1952 Census report, which is the latest, shows approximately—these figures, let me say, were made rather hurriedly and haven't been checked then, but show it forty-four percent.

[50] Q. Forty-four percent? A. Yes.

Q. Now, then, does Tipton County adjoin Shelby County? A. Yes.

Q. I take it the Court and counsel will both have judicial knowledge of that fact. But what is the percentage of the colored scholastic population of Tipton County to the total, based on the same thing? A. Thirty-seven percent.

Q. Thirty-seven percent. Does Fayette County join Shelby County? A. Yes, sir, I believe it does.

Q. What is the percentage of the colored scholastic population to the total population in Fayette County? A. Seventy-three percent.

Q. What is it for Haywood County? A. Sixty-nine.

Q. What is it for Hardeman County? A. Forty-three.

Q. What is it for Madison County? A. Thirty-nine.

[51] Q. What is it for Lauderdale County? A. Lauderdale shows thirty-six.

Q. Are all those counties what might be said located in the Memphis State College student drawing area? A. Yes, sir.

Q. Doctor, have you had any study made as to the approximate number of high school graduates from colored high schools in Shelby County during the year '54-'55?

A. We have a statistical report in the Department for the year ending July 1st, '54.

Q. What does that report show as to the number of graduates from colored high schools in Shelby County alone for that period of time? A. Approximately eleven hundred.

Q. Doctor, as Commissioner of Education, do you have supervision of the distribution of the funds of the various educational institutions in Tennessee on the collegiate level, outside of the University of Tennessee? A. Yes, sir.

[52] Q. Do you mind stating whether or not there is any provision in the appropriation bill for the transfer of any funds from one to another? A. No, sir, they are made on direct appropriation.

Q. Could they be transferred, then, in the absence of provision to that effect? A. No, sir.

Mr. Tipton: Will your Honor excuse me just a minute for a conference?

The Court: Suppose we have a short break in the proceedings, about ten minutes.

Mr. Tipton: I am almost through examining him in chief, if the Court please.

The Court: All right.

Mr. Tipton: I say, I am almost through examining him in chief, if the Court please.

The Court: Well, we will wait until you get through then.

Mr. Tipton: I believe that is all in direct examination, if your Honor please.

The Court: All right, about a ten [53] minute recess, then, about ten minutes.

(Recess.)

Mr. Tipton: If your Honor please, before cross-examination starts, may I ask Dr. Cope two or three more questions on direct examination.

Go around, Dr. Cope.

Q. Do you have a certified copy of the Resolution adopted by the State Board of Education setting forth this plan? A. I do.

Mr. Tipton: Will you make it an exhibit to your testimony, please?

The Clerk: You want it marked, don't you, as an exhibit?

Mr. Tipton: Yes, but we have got to find it.

(Said document was accordingly marked as Exhibit 1 to the testimony of Dr. Cope, and same will be found among the exhibits hereto.)

[54] Q. Dr. Cope, a while ago in your direct examination you stated certain percentage figures in connection with the colored scholastic population in the counties adjoining Shelby, as compared to the total, in terms of percentage there.

Do you have figures available to you whereby the total number of colored scholastic population in those counties can be obtained? A. Yes, sir, statistical report of the State Department of Education.

Q. What is the total scholastic population in Shelby County—colored, I mean? A. On this report, ninety thousand on the total. You want colored?

Mr. Tipton: I want the colored.

A. 37,555 on the '52 census. That was the last one.

Q. Now, then for Tipton County, the colored scholastic population? A. 2,896.

Q. 2,896? A. Yes, sir.

[55] Q. Now, for Fayette County? A. 6,022.

Q. 6,022? A. Yes, sir.

Q. For Haywood County, please Doctor? A. 4,458, combined counties.

Q. 4,458? A. Yes, sir.

Q. Hardeman County, please, sir? A. 2,267.

Q. Madison County, please? A. 4,943.

Q. And Lauderdale County? A. 2,312.

Q. 2,312. I believe you stated they were made in '52? A. That is the latest scholastic population.

Q. As a whole, has the scholastic population increased or decreased since that time Doctor? A. It has increased. At least, our enrollment and attendance, and we assume naturally the scholastic population.

[56] Q. Has increased. Now, then, Doctor, one fact that presents itself in connection with this plan, if adopted pending this transition period, does the state have any provisions to take care of colored students who may desire higher education? A. We have A. & I. State University, Nashville.

Q. Where is it located, Doctor? A. Nashville.

Q. Would you mind describing the plant and physical facilities of that school that will be available to colored students pending the plan, presuming the plan is adopted. A. We have what we consider a very fine institution. We have a state appropriation of almost two million dollars for the operation of the school.

Q. What is the appropriation for Memphis State? A. Seven hundred eighty-seven thousand dollars.

Q. How do the physical facilities of A. & I. compare with Memphis State, or any other State University outside of the University of Tennessee—state collegiate schools, I would say? A. I would say they have more complete

physical [57] facilities than any of our state institutions other than University of Tennessee.

Attorney Carter: I am sorry, I didn't hear you.

A. More complete, I would say; more adequate plant than any other institution except the University of Tennessee.

Attorney Carter: What has more?

A. Physical plant.

Mr. Tipton: I believe that is all, if your Honor please.

Cross-examination by Attorney Looby:

Q. Let me see that little book you are reading from, Doctor.

What page were you reading from, do you know? A. I don't recall. I can check it.

Q. I see you have some marks on that, what you are reading there. A. Yes, sir.

[58] Q. Doctor, before you were with—Commissioner of Education, I believe you were employed out at the University? A. That is correct.

Q. What year did you leave the University there? A. What year?

Attorney Looby: Yes, sir.

A. 1953.

Q. So you were there, then, at the time that Negroes were admitted to the University of Tennessee? A. Not at the time, I believe, that the first were admitted. I was only at the University for a short time.

Q. Sir? A. I was not there at the time the first students were admitted, I believe.

Q. Well, do you know as a matter of fact that students were admitted? A. Yes, sir.

Q. Negro students were admitted? A. Yes.

Q. And that Negro students have been at the [59] University for several years since then? A. Yes, sir.

Q. And several have graduated? A. I don't know know about that.

Q. You know that there are Negroes at the University of Tennessee now, do you not? A. Yes, sir.

Q. And they seem to get along all right at the University of Tennessee, don't they?

Mr. Tipton: What is the question? I couldn't hear it.

Q. They get along all right at the University of Tennessee, don't they? A. Well, I have heard nothing to the contrary.

Q. Do you have any reason to believe that the contrary would ocur at Memphis State College if five students were admitted? A. Well, of course, the students at the University of Tennessee were on the graduate level, I believe, mature students.

Q. I didn't ask you that. Do you understand the question? [60] A. Not sure that I got it.

Attorney Looby: Will you read the question, please?

The Court: Just ask it again. I believe that is the quickest way to get at it.

Attorney Looby: All right, sir.

Q. Do you have any reason to believe that any other development would occur at the Memphis State College

than at University of Tennessee? A. Well, I have—I think you have a different—excuse me, a matter of opinion, I think you have a different climate in Memphis or West Tennessee than from the climate that exists in Konxville, perhaps, about this particular question of integration.

Q. Dr. Cope, as Commissioner of Education, do you have a knowledge of the accredited schools in the City of Memphis? A. Accredited high schools?

Attorney Looby: Yes.

A. We have that as a matter of record. I couldn't name all of them.

Q. Well, see if you can name a few. How about [61] Booker T. Washington High School? A. It is an accredited high school.

Q. And a graduate of that school would be qualified for admission at any of the state teachers colleges, wouldn't he, as far as education is concerned? A. As far as the standing of his high school, yes.

Q. How about Douglass High School? A. About what?

Q. How about Douglass High School in Memphis? A. I can't recall from memory the names of all these schools.

Q. Do you remember Douglass? A. I would assume that it is an accredited school. In fact, as far as I know, the City Schools, public Negro schools of the City of Memphis are all accredited schools, as far as I know.

Q. So that any person graduating from any of the high schools maintained by the City of Memphis would be qualified for admission to any of the teachers colleges on the basis of educational qualifications? [62] A. On the same basis that graduates of any school, any accredited school, are.

Q. What? A. On the same basis that a graduate of any accredited school is.

Dr. Quill E. Cope—Cross

Q. Doctor, I will ask you very pointedly, the only reason these students are denied admission is because of their race, isn't it? Isn't that true? A. I wouldn't say that that is true.

Q. Well, can you tell us if any other reason? A. Well, the reason, because of the fact that the State Board plan provides for them to make some adjustment to this problem, and there is no way of speculating—

Q. And the adjustment is because of race, isn't it? A. Well, the basis of denial was because of race, that is correct, and adjustment—

Q. And that is true, isn't it, the basis of denial is race? A. Yes, I would have to say that.

Q. Dr. Cope, how many out-of-state members—let me see—the Memphis State College is established [63] primarily for residents of the State of Tennessee in the Western Division, isn't it? Sir? A. Well, I would assume so, yes.

Q. And admission of students from out-of-state was not part of its primary function? You serve Tennesseans first, don't you? A. There is no policy to that effect, I mean it is an institution, certainly was established by the Legislature—all of our State colleges or institutions were primarily established for Tennesseans, but there is no policy at any institution of higher learning in this state saying you have got to serve Tennesseans first.

Q. Dr. Cope, how many out-of-state students were admitted since the applicants were denied? A. I don't know.

Q. Have any been admitted? A. I would assume so, but I don't know it of personal knowledge.

Q. Have you made any effort to ascertain? A. No, I haven't studied that question, because all the institutions under the State Board of [64] Education admit out-of-state students, and the State Board has no policy prohibiting the admission of out-of-state students.

Q. Now, I notice—I think you probably can find it better than I can—let's take, for example, Fayette County. How many Negroes were living in this county? A. This shows scholastic population in that county, fifty-two.

Q. Now, scholastic population, people between what ages? A. Between the age of six and eighteen, yes, sir—'52 here.

Q. How many Negroes in this county? A. According to this, 6,022.

Q. How many went to college? A. From Fayette County?

Attorney Looby: Yes.

A. I couldn't tell you how many.

Q. So these figures, they show nothing, because out of that six thousand, if six may have gone to college, as far as you know, or none may have gone—[65] that is true, isn't it? A. Well, I am sure some went. I couldn't tell you. We have that information for this year, not for '52.

Q. You have for this year? A. I guess I have it for Fayette County. I am not sure which county.

Q. Well, is there anything to show there with respect to these population figures that you have introduced? A. Well, I told you that a run-down on that showed twenty-seven percent in counties of the schools we heard from. I don't recall that we heard from Fayette County or not.

Q. That percentage is true of people who went to college, or just population? A. Twenty-seven percent.

Attorney Looby Yes.

A. That is return from the questionnaires, from the schools that replied, showing how many of them went to college, all colleges all over the country.

Q. All over the country. We are primarily [66] interested in Memphis or in West Tennessee. Have you any figures that show us the number who went to college from any of the counties of West Tennessee? A. That is what I am telling you, the number that went to college.

Q. Sir? A. That is the figure I am giving you. Twenty-seven percent of the ones that reported went to college.

Q. Do you mean that that twenty-seven percent of the scholastic population of Memphis went to college? A. Not of the scholastic population, no. I wouldn't say twenty-seven percent of any particular county. That was the percentage of the number who finished high school from whom we got reports, added together, the number of graduates out of that total group that entered college somewhere this fall.

Q. Now, of what group that comprises— A. The schools that replied to the questionnaires.

Q. Well, now, the schools were what, what schools? A. Mr. Turner has that information, and he gathered it. I couldn't give you a breakdown. I just recall [67] the figure twenty-seven percent we ran down on it.

Q. Did you say that was for the country? A. For what?

Q. Did I understand you to say that was for the country, for admission? A. Oh, no, just the West Tennessee high schools.

Q. Twenty-seven percent went to college. Then that includes colleges all over the country? A. They may have attended colleges all over the country, these graduates, yes, sir.

Q. Well, a large percentage, a large portion of that percentage goes to private institutions? A. I would assume so.

Q. So, as a matter of fact, Dr. Cope, you really don't know what percentages went to the state colleges? Sir?

A. I think that Mr. Turner has that record, the number of graduates.

Q. But you don't know? A. I couldn't give it to you.

Q. Now, Dr. Cope, for the purpose of the record, our Legislature is elected and meets biennially, isn't it? [68] A. That is right.

Q. And the Legislature for 1955 has not been elected yet? A. For 1957.

Q. For 1957, yes. A. That is right.

Q. Sir? A. It has not been elected, no, sir.

Q. And the next meeting of our Legislature will be 1957? A. That is correct.

Q. And, Dr. Cope, you don't know, of course I know you don't know, no more than I do, who were the members of that Legislature, do you? A. Don't know who will be members of the Legislature, next Legislature?

Attorney Looby: Yes.

A. No, I don't know.

Q. And so you don't know what appropriation they may decide to make for these different institutions, you don't know today what they will do with respect to these institutions? A. No, I couldn't say for certainty what—

[69] Q. And the Legislature make appropriations according to needs, doesn't it? A. Because of needs?

Attorney Looby: Yes.

A. Well, we hope so. It is always a very difficult question as to what the Legislature will appropriate.

Q. So that it is really a guess so far as you and I are concerned today as to what the Legislature will do concerning it? A. It could not be a matter of certainty.

Q. No, sir. By the way, as Commissioner of Education of the State of Tennessee, you have kept up with all the educational trends in the State of Tennessee, haven't you? A. Well, I wouldn't say all of them. I have tried to keep up with them.

Q. You have tried to? A. Yes.

Q. That is your job, and you have tried to do your job. Has there been any—let's see, what what the word you used—have been a large number of [70] negroes—yes, has there been an unbridled number of negroes going to the University of Tennessee since they have been admitted? A. Any what number?

Q. Whatever words you used as you referred to students then—a large number of negroes. A. At the University of Tennessee.

Attorney Looby: Yes.

A. I would say not. Of course, the University of Tennessee has only admitted them to areas in which there is no offering in other state institutions.

Q. In what areas they have been admitted, there hasn't been any large numbers, no alarmingly large numbers so as to upset the educational system? A. No, I would say not.

Q. What reason, Dr. Cope, do you have, or any member of your Board have for assuming that there will be any tremendously large number of applicants for Memphis State College? A. Well, you have the heaviest concentration of negro population in the State here in Memphis and Shelby County. You have an institution out there [71] that is terrifically overcrowded already. And, of course, it problematical, but it could.

Q. It is overcrowded. Has it ever denied admission to any out-of-state students? A. I don't know. I couldn't answer.

Q. Sir? A. As far as I know, it hasn't, but—

Q. Have there been any applications other than these five, these five—has there been any other applications from negroes for admission from this state at Memphis State College? A. Not to my knowledge. I couldn't—

Q. None has been brought to your attention as Commissioner? A. No, sir.

Q. What are the requirements for admission to the state colleges, Dr. Cope? A. Must be graduated from an accredited high school.

Q. Is there any graduate of any accredited high school —is he admissible for admission to the Memphis State College, provided he is white, is that correct? [72] A. That is correct. There are certain other things. I should modify that. They have to have recommendation from the high school principal, and character recommendations, certain other things of that type, but basically it is a question of graduation from an accredited school.

Q. Isn't it true, Dr. Cope, that since you filed your answer with this plan that you now present to the Court, hasn't your Board met and changed that plan? A. The Board has met and changed it?

Attorney Looby: Yes.

A. No, sir.

Q. Is that plan in operation now? A. That plan is not in operation, no.

Q. It is not in operation? A. No.

Q. Well, what has the Board done with respect to that plan since this answer was filed? A. They have done nothing, because one part of the plan was that this plan would become operative when the Constitution and laws of Tennessee controlling [73] segregation in the public schools were declared invalid, and since this case was in court

nothing has been done. There has been no modification of the plan.

Q. So that plan was never intended to go into effect immediately, it was to be held in escrow provided that the Constitution and Statute of Tennessee was declared unconstitutional? A. That was the thinking of the Board.

Q. Did you have that condition in the plan? A. Yes, sir.

Q. And by what court did the Board, you and the Board want this constitutional inhibition, or this mentioned in the answer of the Constitution or By-Laws passed on, by this Court or by the State Court? A. For this plan to be passed?

Q. Yes. You say you were waiting until the Constitution and laws were declared unconstitutional. Was that by the State Court? A. Well, I don't know. I would assume—

Q. So, Commissioner, really you don't know when and under what conditions your plan was supposed to be put into effect? [74] A. Well, when the Courts declare the Constitution or Statutes of Tennessee on that null and void, you were sworn to uphold as officials of the State and Members of the Board laws of the State of Tennessee, they are still on the statute books, and there is no declaration on it.

Q. So, coming right down to cardinal situation, these students who are now plaintiffs here were denied admission because you thought and still think that it is contrary to the Constitution of the State of Tennessee and the laws of that State? A. There has never been any declaration that—

Q. I am asking you the question. You can answer it yes or on, and explain any way you want to.

Mr. McCanless: Repeat the question, so he can.

Q. Did you understand, did you hear the question? A. I wish you would repeat it.

Q. Sir? A. I wish you would repeat it.

Q. All right. These students who are now plaintiffs were denied admission to the Memphis State [75] College, and with the approval of the Board of Education, because, in your opinion and that of the Board, the Constitution and Statutes of Tennessee prohibited it? A. That was one of the reasons, yes.

Q. Sir? A. That was the reason, one of the reasons.

Q. That was the reason? A. Yes, one of the reasons.

Mr. Tipton: Is that all you have?

Attorney Looby: That is all.

Mr. Tipton: Just one question on redirect examination.

Redirect examination by Mr. Tipton:

Q. Dr. Cope, at the time when this plan was proposed and finally adopted by the State Board of Education, was this current litigation then pending, had it been filed? [76] A. It had.

Mr. Tipton: That is all I want to ask.

The Court: That is all, Doctor.

(Witness excused.)

Dr. J. Millard Smith, the next witness, having been first duly sworn, testified as follows:

Direct examination by Mr. Humphreys:

Q. Please state your name, age, and place of residence. A. State the question again.

Dr. J. Millard Smith—Direct

Q. State your name and your age and place of residence. A. My name is J. Millard Smith. I live on the campus of Memphis State College. I was sixty years old March 10th, last year.

[77] Q. What official position do you hold with Memphis State College? A. I am president of the College.

Q. How long have you been president? A. Since 1946.

Q. What has been your experience in the field of education? How long have you been connected with it, and in what way have you been connected with it? A. I graduated as a student there in 1929. I have served as member of the factulty, as principal of the Training School, as Dean of the College, and as President of the College.

Q. Are you, by reason of your association, acquainted with the physical plant at Memphis State and able to testify with respect to that? A. I think so.

Q. Do you know about the situation there? A. Yes, sir.

Q. Is Memphis State a member of any association of colleges? A. It is accredited by the Southern Association of Secondary Schools and Colleges, which is the [78] regional accrediting association for this area.

Q. I wish you would explain the significance of that association and the accreditation you speak of. A. The schools—the significance of the accreditation of any college in the city, its academic standards are determined by belonging to this organization. In other words, it is the controlling agency for determining the academic standards of any institution of higher learning or secondary schools.

Q. Now, why is that important at Memphis State College? A. In order that our students may receive recognition for credits which they earn at professional schools, or to other schools to which they may transfer.

Q. In other words, if you were not to have this standing, accredited standing, with this Association, your stu-

dents would not be accepted at other colleges or universities for admission or for other work in those schools, is that correct? A. Their credits would not be accepted at full value, or they might have to substantiate their credits by examination or some other process.

[79] Q. Is it part of the program of higher education for all of your colleges or universities to belong to that? A. They all do.

Q. And is that— A. All of the state institutions.

Q. And is that, in your opinion, indispensable to the functioning of state colleges or universities in their sphere of higher education? A. Absolutely.

Q. Now, are there any requirements by this association with respect to the amount of money which must be expended for instructional purposes per capita? A. Yes, sir.

Q. In the student enrollment? A. The student enrollment. The Southern Association has a group of standards, some seventeen. One of these standards deals with the amount of money which must be spent for instruction for each student in your college.

Q. What is the rule with respect to that in the Association at the present time? [80] A. For colleges which offer graduate work, there must be a minimum spent on instruction alone of three hundred dollars for the academic year.

Q. Does Memphis State offer graduate work? A. Yes, sir.

Q. Does it come within the requirement of three hundred dollars? A. Yes, sir.

Q. Now, is there a requirement of the Association with respect to the number of teachers that are required to handle the student body, and, if so, explain what it is. A. The Southern Association requires one teacher for each twenty students. That is the maximum number of students you can have for each teacher. For Tennessee the average in the state colleges is one teacher for each sixteen students.

Q. I see. Now, do you have the standards to which you refer? A. Yes, sir.

Q. (Continuing) —There in some printed form? A. Yes, sir. This is the 1954 Quarterly Report [81] of the Southern Association, which contains these standards.

Q. Will you refer to the page of that report which has, for instance, the standard with respect to the amount of money which must be paid, and read that into the record? A. This document is proceedings of the Fifty-Ninth Annual Meeting of the Southern Association of Colleges and Secondary Schools, December '54. The meeting was held in Louisville, Kentucky. And standards for the senior colleges which are members of this organization are printed on pages beginning with 193 through the middle of page 200.

Q. Now, will you file that, please, as an exhibit to your testimony and make it available to opposing counsel? A. Yes, sir.

Mr. Humphreys: Let him keep it at the present time.

(Said document was accordingly marked as Exhibit 1 to the testimony of Dr. Smith, and same will be found among the exhibits hereto.)

[82] Q. Now, I wish you would state what is the present ratio or the present number of students per teacher at Memphis State, that is, whether you are near the standard, or at the standard, or how about that? A. The report which I recently submitted to the Southern Association as of October 10th showed student-teacher ratio for the year ending June 30th, and for the academic year, let's say, '53-'54, showed a ratio one to nineteen.

Q. 1 to 19. Now, for the present academic year, has that— A. That has not been determined, and will not be

determined until the end of the academic year when the total number of students for the two semesters are averaged, and that number divided by—

Q. Has the enrollment increased, however? A. Yes.

Q. And the teachers' staff, has it been increased? A. Yes.

Q. Has it been increased in proportion to the enrollment increase? A. It will have to be next Spring. It will have [83] to come out not over twenty.

Mr. Humphreys: I see.

A. If I don't have enough on now, I will have enough on now before the end of the year.

Q. In other words, you must maintain the standard? A. That is right, if I can find the money.

Q. But you are in it at the present time? A. That is right.

Q. Now, with respect to the appropriation that is available for instructional purposes, how is the ratio of pupils, —this appropriation,—explain that to the Court,—how near are you now to the required standard? A. Well, the cost last year was $310 per student.

Q. Per student. What is the standard? A. Well, the minimum is $300.

Q. Now, Dr. Smith, assuming,—excuse me, President Smith,—assuming that there are in the future, as has been the case in the past year, eleven hundred who graduate, negro high school students who graduate in Shelby County alone, and that twenty-seven percent, which is the state-wide average, [84] attend college, and elect to attend this college of yours which is in this immediate vicinity, would that or not overtax the facilities of Memphis State so as to disqualify it for membership in the Southern Association

of Colleges, and result in the loss of its academic standing as explained by you? A. It would, definitely.

Attorney Carter: If the Court please, we would like to suggest that if these figures, twenty-seven percent, et cetera are going to be used, that since there could be no testimony of the survey, that the person who has made the survey get the facts of the survey out in the open, so we will know what we are talking about.

The Court: Well,—

Attorney Carter: As it is now, we don't know, twenty-seven percent,—.

The Court: Well, this witness,—the ruling with respect to this witness applies as in the case of the first witness, if you are objecting at this time. It is [85] competent provided Mr. Turner, as I understand it,—

Mr. Humphreys: Yes, sir.

The Court: (Continuing) —Brings in these figures. And the problem is just a problem of how we are going to proceed.

Attorney Carter: The real problem we have is we have laid no groundwork for this figure of twenty-seven percent, and all the questions are being based on it. It is an hypothesis on an hypothesis which we don't know anything about. If we had the survey before us and knew what was involved in the survey, what the twenty-seven percent went to, we would be in better position to know what we could do with the question that has been raised here.

Mr. Humphreys: If your Honor please, you have it in mind, but if I may, I should like to restate that there is testimony that this report, this information was gotten under the instructions of the defendant

Cope, [86] and to that extent is, we believe, qualified. We propose to make it more competent, that is, to bring in the witness who attended to the compilation of the data. But we are following the practice, which I understand to prevail, of introducing the parties, which we are now doing, and then we will call Mr. Turner and let him support this.

The Court: That is about the only way I see we can do it, and we are interested in orderly procedure. Only one witness can testify at a time, of course. So we have in mind your objection, and these figures will have to be substantiated by Mr. Turner before they will be considered in evidence.

Mr. Humphreys: Now, may I go on?

The Court: (Continuing) —Or other testimony based on these figures. All right.

Q. President Smith, in addition to negro graduates from high schools in Shelby County, would your state college serve any of the other West Tennessee counties? A. The twenty-one counties this side of the [87] Tennessee River are ordinarily considered our territory.

Q. I see. You heard the counties that were named by defendant Cope and the percentages that were given in his testimony. Would your college serve those counties? A. Yes.

Q. I see. And you could expect, then, to serve a number,—whatever the percent is of that number, that would be potential enrollees at your University? A. Yes.

Q. Do you have available to the University any other funds than those that are appropriated by the General Assembly of Tennessee and the fees for instructional purposes? A. Nothing of any considerable amount.

Q. The fees for tuition, I mean. You say nothing of considerable amount? A. We get some money in in grants and gifts and scholarships, not very much.

Q. Are they available for general education, the scholarships? [88] A. They are available to students who qualify under certain regulations.

Q. I see. So, actually, the maintenance and operation of the school depends upon appropriations? A. State appropriations or student fees.

Q. Has your appropriation for the biennium '55 to '57 been fixed by law? A. Yes.

Q. And could that be increased, or can it be increased without the Legislature's action? A. No.

Q. Has the Legislature adjourned for the '55 session? A. Yes, sir.

Q. And it could not be reassembled except upon a call for a special session by the Governor? A. Yes.

Q. And I believe that, for instance, is it true that funds which are available for one college are not available for another college? A. Each of our appropriations are stated in the general appropriation bill.

Q. All right. Now, there has been some suggestions by way of cross-examination of Dr. Cope that [89] out-of-state students might be excluded, and thereby an opportunity afforded for in-state students.

What is the policy of your state school and of all other state schools in Tennessee with respect to the acceptance of out-of-state students? A. We don't want to become too provincial by limiting our enrollment strictly to students in this area.

Q. Is that a policy that is adhered to by all the state schools? A. That is the policy which is adhered to by all recognized, outstanding institutions of higher learning.

Q. Is that limited to the State of Tennessee? A. No, sir.

Q. Is that true of all states? A. All states.

Q. So that, as a result of that policy, students from Tennessee can enroll in State colleges and other universities

as freely as students of other states can enroll in Tennessee colleges? A. Yes, sir, by paying additional registration fees.

[90] Q. Now, is this required at your school? A. Yes.

Q. An additional out-of-state registration fee? A. What we call out-of-state tuition.

Q. Out-of-state tuition. Would the exclusion of out-of-state students result in some loss of standing, not disqualification, but some loss of standing in the State of Tennessee of State colleges or universities? A. I wouldn't want to advocate the exclusion policy or eliminating of out-of-state students.

Q. I see. Now, it has been suggested in this program of desegregation of state colleges that it is desirable, in order to avoid possible friction between the lower,—that is the first year classes, if they are admitted immediately in numbers. Can you comment upon that and tell us with respect to that, and what your observation and opinion is with respect to it? A. It is my opinion that the plan—

> Attorney Looby: If your Honor please, just a minute. I don't think Mr. Smith is permitted to tell us his opinion. His [91] opinion isn't any better than mine, or anybody else's. To give an opinion he has to qualify as an expert.
>
> Mr. Humphreys: If your Honor please, he is right there and knows, he sees them every day.
>
> The Court: The witness has been in school work practically all of his adult life, since he graduated, I believe he testified, and he has come into contact with young people through the years.
>
> Is that limited to white schools?

A. No, sir, Judge, for six years I served here in the City of Memphis with the City Board of Education as Director

of Instruction, which covered both white and negro schools. I know every negro teacher in Memphis, or did at that time.

The Court: The Court feels that the witness is qualified to testify on the subject. The objection is overruled.

Q. Now, my question was, speaking from the basis of your acquaintanceship and experience with this [92] matter of education and from your opportunity to see and hear and know and observe the temper of affairs with respect to the subject, would there be friction, would there be difficulty on the campus of Memphis State College if you were to immediately declare for total desegregation of education there and permit free enrollment without this process of gradual adjustment which the Board has proposed? A. May I answer that by saying that it is my opinion that the plan which the State Board of Education has presented to this Court would solve the problem.

Attorney Looby: Just a moment. Just a moment. Your Honor, I want to object to that.

Mr. Humphreys: I want to ask you that next.

Attorney Looby: That is the very question for your Honor to pass upon.

The Court: Well, it is obvious counsel recognizes that the witness' answer—

Mr. Humphreys: Yes, I asked you another question.

[93] The Court: (Continuing) —which he gave is not in response to the question, I believe.

Q. Now, my question was, and just paraphrase it,—would the immediate desegregation of Memphis State College, situated as it is, where it is, under the influences that

it is under, and enrollment on a free basis of negro high school students in the freshman class result, in your opinion, in friction, that is, a difficulty, emotional maladjustment and trouble between the students? A. In my opinion, it would.

Q. I will get you to state in that connection whether in your official capacity you have been consulted by organizations on the campus expressing dissatisfaction with the program, with the idea of immediate desegregation. A. I have had,—I have been consulted or approached by students who were members of certain organizations that the plan which the Board has presented to the Court would probably be the best arrangement, and that they would be definitely against desegregation immediately.

[94] Q. Now, with respect to this plan, did you appear before the State Board of Education at the time of adoption of the plan? A. Yes, sir.

Q. Who else appeared there? A. All the other State college presidents.

Q. Were there any other persons before the State Board at that time? A. Yes, sir, members,—representatives from the Tennessee School Board Association, representatives from the Agricultural leaders, representatives from the University of Tennessee, representatives from Tennessee Education Association. I recall those distinctly. There may have been others.

Q. I believe that presidents of State colleges were there as proponents of the plan; the University of Tennessee is not under the jurisdiction of the State Board of Education? A. No, sir.

Q. Is that correct? A. No, it it is not.

[95] Q. But was the president of the University of Tennessee there? A. The president of the University was present at the occasion of the Board meeting.

Q. Now, was this plan considered by all of those present and the advice and counsel of those who were not members of the Board considered? A. The Chairman of the State Board of Education requested each person there to express himself on the plan as presented. Copies of the Resolution were presented to all who were present. And the Chairman of the Board asked those who were present to comment on the plan as presented.

Q. Was there a comment and general consideration of the plan? A. No one—

Q. I just say whether there was comment and general consideration of it. A. Representatives of all of these organizations to which I have referred commented on the plan.

Q. And was the plan, which was adopted, adopted as the result of the meeting that you described? [96] A. It was adopted immediately after the meeting and after we—the other folks in there were dismissed from the meeting.

Q. And the Board then went into executive session to consider it?

Attorney Looby: If your Honor please, I object to what happened in the meeting.

The Court: If the witness were not present, and he doesn't know—but I take it there is no question about that, and no controversy in this lawsuit about that particular proposition, is there, the fact that the Board did adopt the resolution—is there a controversy about that in this lawsuit?

Attorney Looby: We except to his conclusions all about that. We don't except—

The Court: I can't hear you.

Attorney Looby: We don't accept the plan. Now in its preparation we had—our position is this,

if your Honor please. That [97] is just the plan prepared by the defendants for this purpose, and consequently we don't accept it.

The Court: Well, I understood the question before the Court wouldn't be whether or not the Board actually adopted this plan through the Resolution.

Do you agree that there is no controversy about the adoption of it?

Mr. Humphreys: If your Honor please—

Attorney Looby: I am like the defendants, if your Honor please, I don't know.

The Court: Well, the witness can't—

Attorney Looby: We stipulate nothing.

The Court: Well, the Court rules he cannot testify the action of the Board if he was not a member of the Board.

Mr. Humphreys: That is right, and I am not asking him.

Q. After you had considered the plan, a plan was adopted, or rather a certified copy of the plan [98] supposed to have been adopted by the State Board has been filed here.

I will get you to look at it and state whether or not it comports with the discussion and argument and consideration which was given a fair plan of desegregation at that time by the State Board. A. Yes, that appears to be a copy of the Resolution which was discussed in the open meeting before we were asked to leave.

Q. And it was considered and discussed by all of these various agencies and the members that you have mentioned in your testimony? A. Yes, sir.

Mr. Humphreys: That is all for the present.

The Court: All right.

Cross-examination by Attorney Looby:

Q. Mr. Smith, do you mean to tell me that you just glanced at that plan, that you could tell that [99] is the plan you had, which you had as it was presented? A. I said it appeared to be.

Q. You haven't read it? A. I did not read it.

Q. So you don't know— A. I have read it.

Q. Sir? A. I have read it.

Q. When? A. The report which the State Board adopted.

Q. Did you read the one that you identified, did you read it? A. I said that appeared to be a copy.

Q. Mr. Smith, what—I believe you say you graduated from college in 1929? A. That is right.

Q. And where did you work from then on? A. Well, I served as teacher in the college, principal of the Training School, Dean, and I have been President, as I said, since 1946.

Q. In what capacity or under what circumstances did you have any experience with integration of the [100] races in any educational institution? A. None.

Q. You had none. And yet you consider yourself qualified to testify as to what would happen? A. Yes, sir.

Q. Do you know Thomas Graham? A. Who?

Q. Thomas Graham? A. Yes.

Q. He was the president of the student body last year, wasn't he? A. Yes, sir.

Q. And Graham said that he spoke to a large number of the student body and that they were in favor of integration?

Mr. Humphreys: If your Honor please, I object to that. Even if that is—that could not be proof in

this case on cross-examination. It doesn't go to any testimony of this witness.

The Court: The objection is sustained.

Attorney Looby: If your Honor please, he gives his opinion.

[101] The Court: Well, he is a stranger to this record at this point in the proceedings.

The objection is sustained.

Q. Well, do you know whether or not Graham had consulted and took the opinion of the student body? A. Graham is a very fine young man. Graham told me more than probably any other student. Graham, if I may say so, in my opinion, would favor this plan.

Q. I didn't ask you if he would favor it. A. Well, you kept pushing me on it. I will just tell you.

Q. I will ask you whether or not—you say in favor of the plan, is he in favor of integration? A. He is in favor of this plan the way it was presented to the Court.

Q. Mr. Smith, can you tell me as President of State Teachers College— A. What institution?

Q. Sir? A. What institution?

Q. I didn't say anything else.

The Court: You said State Teachers [102] College. You mean Memphis State?

Attorney Looby: Yes, sir.

Q. (Continuing) —How many non-resident students from Mississippi and other states that have been admitted to your college since these students made the application in September of '54? A. Those answers were provided in the answer to those interrogatories which your attorneys submitted. You have them, or copies of them.

The Court: Have those answers been filed?

A. Yes, sir.

The Court: —With the Clerk? Let me see them. I haven't seen them.

Mr. Humphreys: We furnished them. They were not in the form of interrogatories to take deposition, your Honor, but interrogatories for the information of counsel, and we directed them to counsel, and I don't suppose counsel has filed them in the cause. He can or he cannot. He has the option, as I understand the rule. But I think that they probably should be, and we would like [103] to offer a copy of them for the purpose of the record.

The Witness: Do you want to see my copy, Judge?

Attorney Looby: If your Honor please, I want to ask leave of the Court to file the interrogatories now.

Q. How many students from out-of-state have been admitted to the Memphis State College since these plaintiffs were denied admission? A. I don't have that information. I answered the questions which the attorneys asked me.

Q. Well, I am asking you, I am an attorney, and I am asking that question now. A. I don't know.

Q. You don't know. Have any been admitted? A. I am sure they have, but I don't know how many.

Q. You think more than—at least more than— A. I don't say, I don't know.

Q. I haven't asked the question yet. Would you say as many as five have been admitted? A. I wouldn't know.

[104] Q. Is it true that every year more than a thousand out-of-state students have been admitted? A. More than a thousand?

Attorney Looby: Yes.

A. That is not true.

Q. Approximately how many are admitted every year? A. You have on your list there the number who entered this year. I will read that to you, is what I swore to. One hundred forty-three for the Fall semester of 1955.

Q. Were they admitted subsequent to the application of these plaintiffs? A. I said the Fall of '55.

Q. Mr. Smith, the Fall is rather broad. Were they admitted subsequent to the date that the plaintiffs made application? A. Yes.

Q. I want to ask you direct, Mr. Smith, wasn't it true that the applicants who are now plaintiffs would have been admitted to the Memphis State College were it not for the fact that they were Negroes?

Mr. Humphreys: If your Honor please, [105] wait just a minute. I want to make this observation.

Q. I ask you—

Mr. Humphreys: Excuse me just a minute. I want to make this objection.

It is clear and plain and evident that the President of the College or college offiicals acted upon the prima facie requirement of the Constitution and Statute and direction of the State Board of Education until such time as your Honor, for instance this morning has declared these laws inoperative. We were aware of what the Supreme Court of the United States had said in Brown v. Topeka, but that was a declaration that was not specific to these authorities until your Honor said this morning that you thought it was, and now it is. It was not a matter of personal

or prejudicial discrimination. It was a matter of compliance with the constitutional provision and legal provision that had been validated by the Supreme Court [106] of the United States, it was for generations. And he acted upon that. And now he loads to this witness, "didn't you deny them entrance because of race?"

I just submit that it is not a fair question in this procedure.

Attorney Looby: If your Honor please, all that the Attorney General say is correct, and, in fact, all that we are going through now could have been avoided if they would have just simply admitted things that are obvious in the face of the pleadings, and let's get right down to the substance of the lawsuit. But that is a matter, if your Honor please, like the qualifications of these students, to present all five principals to show the qualifications. I think it is just wasting time, but we are required to do it.

The Court: Well, I take it there is no question but that only white students have been permitted to attend this school. [107] I don't think that there is any controversy about that in this lawsuit.

Mr. McCanless: No, not a bit.

Attorney Looby: No.

The Court: If there is, we can settle that now. As far as counsel for respondents are concerned, do you raise any question along that line?

Mr. McCanless: No, sir.

Mr. Humphreys: No, sir.

Attorney Looby: If they appeal, our pleadings haven't been admitted, if your Honor please, and we have to prove it.

The Court: Well, that is settled definitely. Only white students have been admitted to this particular school up until this time.

Attorney Looby: And these plaintiffs, they are denied because of their race and color.

The Court: I am sure that is true. And I believe what the Court has already said [108] amply covers the proposition.

Attorney Looby: If they admit that, if your Honor please—

The Court: All right.

Mr. Humphreys: Now, if your Honor please, there is this further question that does enter into it. The question of their personal qualification was not reached upon the occasion that they applied for the admission. An investigation of the facts will show and I am sure the witnesses in question here show that when they appeared to be Negro students the Constitution and Statute were considered to be operative, and the personal qualification of the students, et cetera, were not gone into.

Now, whether he has them or not, whether he knows them or not—I know what he will say because he has told me. But we don't know whether they have those qualifications so as to put them in position to claim it.

The Court: I understand that would be a question of proof in this lawsuit.

[109] Mr. Humphreys: Yes, sir.

The Court: —with respect to these five individual plaintiffs.

Mr. Humphreys: Yes, sir. Of course, when we get to that—

The Court: Of course the school authorities still pass on the qualification.

Mr. Humphreys: That is right.

The Court: —of all students. I don't suppose there is any question about that in this lawsuit?

Mr. Humphreys: No, sir.

Q. All right, now, Mr. Smith, then—

The Court: They are not permitted to exclude them on racial grounds. That is the idea about it.

Q. When these students came to the college and were making application to register, did they come to see you? A. Yes. I have a memorandum on that, on that meeting, if you will permit me I will read it.

Q. Don't read anything you said about it. I just [110] want to know what happened. A. I am going to tell you.

Q. All right.

Attorney Looby: If it is just something he said, if your Honor please—of course, I don't want him to read any self-serving declarations not competent in this suit.

The Court: What is the question?

Attorney Looby: I asked him whether or not he had—when they registered, if they came to him at the time these students made application. I don't know what he is going to read, but I don't want any self-serving declaration.

The Court: It is very difficult to hear you here. I still didn't get the question. What is it?

Attorney Looby: My question is, when these students came to register at the college, did the Registrar come to him and appeal to him. He could have answered it yes or no. [111] But he wants to read a statement, and I don't know what is in the statement. If it is a self-serving declaration, it would be objectionable.

The Court: You are asking him if on that occasion the Registrar of the school came to see him?

Attorney Looby: Yes, sir.

The Court: Well, answer that yes or no.

A. Yes, he came.

The Court: You are entitled to explain the answer, of course.

Q. And at the time you went out in the office, did you go to speak to them?

The Court: Let me just interrupt, just a minute here. Let me, in the interest of saving a little time here—I have suggested already that there are a good many things here that are not in dispute in this lawsuit. Now, can we go this step further by saying that these particular individual plaintiffs were denied admittance at the [112] Memphis State College on this occasion he refers to?

A. Because of the regulation and policy we have that we are limited only to white students.

The Court: Is that right?

Attorney Looby: Now, the next question, if I may continue right on, if your Honor please—whether or not they did not come there with their credentials, prepared to—

The Witness: I can't understand you.

Attorney Looby: I am talking to the Judge now, Mr. Smith.

The Witness: Oh. I thought you were talking to me.

Attorney Looby: I am intending to show further, if your Honor please, that at the time they were there they had then their credentials ready to present to the authorities.

The Court: All right, can we stipulate that they did have credentials on that occasion, and you refer to the records, high school records?

[113] Attorney Looby: Yes, sir.

Mr. Humphreys: We will find out if we can, if your Honor please.

The Witness: I can answer the question, if you want me to. I can answer the question. I know it.

Are you ready for me to answer that?

Attorney Looby: Yes, sir.

Mr. Humphreys: The Court has made inquiry whether out there—the other party, the bursar, says he made no examination of the records and doesn't know—the Registrar there—whether they were adequate or inadequate. They were never actually examined after their appearances were made.

Attorney Looby: We can show the defendants' counsel, we can show him the records now and save that much time.

Do you want to see them, General?

Mr. Humphreys: I would like for him to finish with the witness.

The Court: I don't believe there is [114] any controversy about the proposition that these individual plaintiffs submitted themselves and were refused admission because they were members of the negro race. Now the witness says he can answer the question more in detail but, if there is no controversy about it, I see no point in pursuing that any further. However, in the interest of a full record, if you want to develop these things, all right.

Attorney Looby: No, sir. I was simply trying—it is not so much in the interest of the record as of saving time.

(Counsel confer.)

Attorney Carter: See, the dominant problem we have, your Honor, we think in the interest of time in the case that Mr. Looby has been trying to—it has been admitted they were denied admission because of race, on the occasion that they were denied admission because of race, and the Attorney General says, and the defendant says [115] they don't know whether they met the qualifications, the qualifications for admission as far as that is concerned, is that aside from the racial aspect, is that you have to be a graduate from an accredited high school. Now we have the transcript here on this of these people, if they want to look at them, and we can save them having to put them on the stand, can save time of having to put them on the stand.

The Court: Let them look at them.

Attorney Carter: Well, there is no point of going into that.

The Court: As I say, I don't think, from what I know about this lawsuit, that there is any controversy about their qualifications, and that that is not particularly material here.

Attorney Carter: We didn't think so either, but we can't seem to get any such admission.

The Court: The witness says he can [116] enlighten us. Then what were you going to say, Dr. Smith?

A. They did not bring them, anyway.

The Court: They did not bring them?

A. They did not have those, Judge. I asked them the specific question, all five of them in the room, if they had the transcript. They said they did not. And then I read them this statement in the catalog, or rather, the provision about white students, and terminated the conference.

The Court: This was a conference—who was in the office there?

A. With the five applicants. With the five applicants. They had no transcript with them. I asked them that specific question. It would not have made any difference, however.

By Attorney Looby:

Q. Well, now, Mr. Smith, in that connection when you came out there, one had application and you took it away from him and refused to give him the application to fill out, didn't you? A. I did not.

[117] Q. Sir? A. I did not. I asked all five of them if they had their transcript with them, and they said they did not.

Q. I ask you, didn't you tear up— A. No, I did not see any transcript.

Q. Did you tell the Registrar— A. No, sir.

Attorney Looby: Does he know before—

The Court: Give him an opportunity to ask the question.

Q. Did you take away the application blank from one and tell the Registrar not to give them any— A. No, sir.

Q. Well, how do you know before you heard the question?

Did you advise the Registrar not to give them any application blanks? A. I told the Registrar we would not admit them.

Q. Did you tell him not to give them the application blanks? A. I told the Registrar we would not admit them. [118] I don't know whether I told him about the blank or not.

Q. Well, you evade my question there again now, Mr. Smith.

Did you tell the Registrar not to give them the application blank? A. I told him not to admit them.

> The Court: Well, can you answer him direct there? It seems they want a direct answer on that, Professor.

A. I don't understand what you mean by application blank. We have what we call the transcript, the transcript blank form. They file their high school credentials, and then the application blanks are printed in the back of the catalog. But that doesn't carry any transcript. That is the application blank, if that is what you are talking about.

Q. Dr. Smith, I am not asking about— A. Well, and I do not recall whether I ever told Mr. Clark, the Registrar, not to give those registration blanks or not. I don't know whether I did or not, just couldn't answer that.

> Attorney Carter: We have the transcript here.
>
> [119] The Court: All right, pass them over there and let me see them there, and see if they are— the individuals or plaintiffs that are qualified from the scholastic standpoint.
>
> (Documents examined by counsel.)
>
> The Court: All right, are we through with this witness?

Attorney Looby: Yes, sir.

The Court: All right, Mr. Smith, you may resume your chair.

(Witness excused.)

The Court: Call the next witness.

Mr. Tipton: All right, call Mr. Ed Turner, please. He is outside. W. E. Turner.

We are having the transcripts examined by technical authorities, if your Honor please.

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[120] W. E. Turner, the next witness, having been first duly sworn, testified as follows:

Direct examination by Mr. Tipton:

Q. You are Mr. W. E. Turner? A. Yes, sir.

Q. Mr. Turner, you are going to have to talk loud so they can hear you.

Where is your home? A. Nashville, Tennessee.

Q. That is fine. They all must hear you.

Are you connected with the Tennessee Department of Education in any capacity? A. I am.

Q. What is that capacity? A. I am Director of the Division of Instructions, Coordinator, it is.

Q. Do you have any official duties in connection with colored education as well? [121] A. Yes, sir, for the past twenty-five years I have been Director of the Division of Negro Education.

Q. As such Director quite recently did you have occasion to make a survey of the high school graduates from colored high schools in West Tennessee with the view of determining how many of them, how many of those graduates went to higher institutions of learning? A. I did.

Q. Now, Mr. Turner, when was that survey begun, roughly, approximately, we don't have to have the day. A. Oh, approximately three weeks.

Q. Approximately three weeks. Now, did it cover the high school graduates from the scholastic year that ended June 30, 1954? A. It did.

Q. What was the method employed in making that survey, Mr. Turner? A. I asked the principals for the number of graduates last year, and the number that went to college, and then the college which they attended.

Q. Now, right there, Mr. Turner, was that survey—[122] state this yes or no—was that survey conducted—I mean by that, the questionnaires sent to these high school principals? A. No, I told them the information I wanted. If you want to call that a questionnaire, yes, sir.

Q. What I am trying to get at, did you write them personally, each high school personal, for that information? A. I did.

Q. How many letters to high school principals, approximately, did you contact, do you have any idea? A. Contacted all of them.

Q. I don't know what—the Court doesn't know just how many. You mentioned all of them. Can you explain that? A. Well, let's say thirty-five.

Q. From how many did you get replies? A. Sixteen.

Q. Sixteen of the thirty-five? A. Yes, sir.

Q. Mr. Turner, in the first place, how many high school graduates, graduates from colored high schools [123] in the year ended July 1st, '54—'55, I mean— A. That I have here.

Q. That you have there. A. 674.

Q. 674? A. Yes, sir.

Q. Now, then, how many of those 674 attended institutions of higher learning? A. 212.

Q. Do you have there a breakdown by schools of the institutions to which they went? A. Yes, sir, I do.

Q. We would like to file this. Will you please make that Exhibit 1 to your testimony there? A. Got a lot of writing on it.

(Said document was accordingly marked as Exhibit 1 to the testimony of Mr. Turner, and same will be found among the exhibits hereto.)

Attorney Looby: We would like to see a copy of it.

Mr. Tipton: I don't know whether we [124] have a copy of it or not.

Q. Do you have a copy of it? A. No, sir, I don't.

Attorney Looby: We would like to see it before entering it.

Mr. Tipton: All right, I've got no objection to you seeing it.

I might say here the tabulation there, or some of the tabulation is mine, in pencil. We didn't have—if my arithmetic is wrong, we stand corrected.

The Court: Let me understand. You contacted thirty-five colored high school principals?

A. Well, I don't remember the number, Judge.

The Court: Approximately thirty-five colored high school principals?

A. That is a guess, yes, sir.

The Court: Colored principals?

A. Yes, sir.

The Court: And received replies from sixteen?

[125] A. That is right. Many of the high schools in West Tennessee are not in session at this time.

The Court: Is that the reason you did not receive more replies?

A. I think so.

The Court: One reason?

A. I think so, yes.

Mr. Tipton: I guess the percentage of it would be a matter of calculation. I see no necessity of figuring percentage there for the record. It appears to be, instead of twenty-seven percent, approximately thirty-one percent, according to my figures, but I never was too good at arithmetic. And so it will stand recalculation, I am sure.

I believe that is all I want to ask him.

Attorney Looby: Just a minute.

Mr. Tipton: Do you have any objection to filing it now?

[126] Attorney Looby: No, but I want it back, and ask a few questions.

Cross-examination by Attorney Looby:

Q. Mr. Turner, your computation shows that a large majority of college students went out of the state, or went to other colleges other than state colleges. A. You will have to let me see that again.

Mr. Tipton: They are all set out there. They are identified, each school they went to. I guess it would just be a matter of counting up there. I am just trying to expedite it.

Q. That is filed, and shows the school to which they went? A. Well, I think most of them went to institutions within the state, Mr. Looby.

Q. But I am not—not state schools—most of them went to state institutions? [127] A. You mean institutions within the State, state controlled institutions?

Q. Owned and operated by the state. A. Well, I don't know. I would have to look that over.

Q. How many state colleges for negroes are there in West Tennessee? A. You will have to—I am having the same trouble—

Q. How many state colleges for negroes are there in West Tennessee? A. Within the State, and state owned?

Attorney Looby: West Tennessee.

A. State controlled?

Q. State institutions.

Mr. Tipton: If your Honor please—

Attorney Looby: State colleges, or state institutions.

Mr. Tipton: We are right here. We can stipulate there is only one state controlled school of higher learning for negroes in the State of Tennessee, A. & I., in [128] Nashville, Davidson County. We can agree on that, none in West Tennessee, none in East Tennessee.

Attorney Looby: And we ought to stipulate the distance from Memphis there as two hundred and twenty—

Mr. Tipton: 227 miles from Nashville to Memphis, and we can stipulate that.

Attorney Looby: All right.

Mr. Tipton: Are you through?

Attorney Looby: Yes.

Mr. Tipton: We are through, if your Honor please.

The Court: All right, anything further from this witness?

Mr. Tipton: No, sir.

The Court: All right, Mr. Turner, you are excused.

(Witness excused.)

[129] Mr. Tipton: We rest.

The Court: All right, the respondents rest in chief.

Mr. Tipton: Yes, sir, we rest in chief.

The Court: And it is now about our noon hour. Can we come back at one-thirty? Would that crowd anyone? Let's say one forty-five, is that better?

Mr. Tipton: One forty-five would suit us better.

The Court: Adjourn it until one forty-five, Mr. Clerk.

(Adjournment.)

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[130] Afternoon Session, October 17, 1955

The trial of the case was resumed at one forty-five o'clock P. M., pursuant to adjournment, as follows:

The Court: All right, Mr. Tipton, you wanted to address the Court at this time?

Mr. Tipton: Yes, sir, I was going to state this. Before we rested at the noon hour, the Court asked us to see whether or not we could stipulate as to the eligibility of these particular students who are the

plaintiffs in the present case, and pursuant to that request we were furnished with the transcript of credits of four of them there. They have been examined by persons more experienced in that than I, and they found, as far as these transcripts are concerned, these four, that these plaintiffs, as far as credits, are qualified to enter scholastically, so that can be stipulated with respect to [131] these four. Shall I read the names of them into the record?

The Court: Is there another one, are there five of them now?

Mr. Tipton: There is another, there are five of them now. But he has no transcript that has been furnished us, and without his transcript we can't stipulate. I don't know where the transcript is and cannot state.

The Court: Do you have that transcript with respect to it?

Attorney Lockard: No, we don't your Honor, but we do have some college work which he has done and we would like through his testimony or by his testimony to show his qualifications. We are looking for that right now.

The Court: All right. Then it is stipulated between counsel, as I understand, that these four do show scholastic qualifications?

[132] Mr. Tipton: These four, yes. And I read their names in the record.

The Court: All right, now.

Mr. Tipson: Mardest Knowles, Ruth H. Booker, Joseph McGhee, Nellie Peoples.

The Court: All right, do plaintiffs desire to put on proof at this time?

Attorney Lockard: Yes, your Honor.

The Court: All right, call your first witness.

[133] PLAINTIFF'S PROOF

(Thereupon the plaintiffs, in support of the issues on their part, introduced evidence as follows, to-wit:)

ELIJAH NOEL, the next witness, having been first duly sworn, testified as follows:

Direct examination by Attorney Lockard:

Q. State your name, please. A. Elijah Noel.

Q. Are you a resident of Tennessee? A. I am.

Q. Are you a high school graduate? A. I am.

Q. From what high school did you graduate? A. The Robert R. Milton High School, Marion, Arkansas.

[134] Q. When? A. 1943.

Q. Is that an accredited high school? A. It is.

Q. Did you attempt to make an application at Memphis State College for admission? A. Yes, I did.

Q. When? A. June of 1954.

Q. Were you refused admission? A. Yes, sir.

Q. What was told you at that time as the reason for your being turned down? A. In answer I was told that admission to Memphis State College was restricted to white students only.

Q. And following that, of course, you left the school? A. I did.

Q. Have you entered college or have you done any college work since your high school graduation? A. I have.

Q. Where was that work done? [135] A. At Howard University located at Washington, D. C., and a few hours at LeMoyne College in Memphis, Tennessee.

Attorney Lockard: That is all.
Mr. Tipton: No questions, your Honor, please.
The Court: All right.

(Witness excused.)

Attorney Looby: If your Honor please, that is the plaintiffs' case.
The Court: I take it there is no rebuttal.
Mr. Tipton: None.
The Court: (Continuing) —on the part of respondents.
Mr. Tipton: No, sir.
The Court: No.
(This was all the evidence introduced in the case.)

• • •

[167] The Court: Is there anything further from anyone, now, at this time?

We have had a full hearing of this class action, and the single issue before the Court is relatively simple. The Court will undertake to give you briefly its views about it at this time.

In the first place, we are all bound to agree that the Supreme Court has very definitely ruled that racial discrimination in the public schools is unconstitutional, and that all state or local laws requiring or permitting racial segregation in the public schools must yield to this principle.

While the Supreme Court in its recent decisions was dealing with public grade schools, unquestionably, if this is a question in this lawsuit, the reasoning in those cases is as applicable to public schools of higher education such as Memphis State College. A three judge court in the Fourth Circuit, I believe said as much recently in Frayser against the Board of Trustees of the University of North

Carolina, a case mentioned by plaintiffs' counsel here this morning.

[168] Now, the Supreme Court has told us what must be done, but has not told us how it must be done. So there remains for consideration of this Court only the manner in which the Supreme Court's pronouncements will be carried out. This is our problem in this case. The Supreme Court, recognizing the perplexities in the situation, has vested the District Judges with discretion in dealing with the problem.

This Court, I must say in the outset, is impressed very much with the prompt and sincere efforts of the respondent Board members who have the primary responsibility in this matter, to comply literally with the commands of the Supreme Court. The respondent members of the Board have acted promptly, as I say, not only with respect to Memphis State College, but a number of other schools similarly situated around the State.

The plan here proposed by the respondents to open the doors of State supported institutions of higher learning to academically qualified colored students a year at a time from the graduate level down [169] is certainly a reasonable good faith start toward full compliance and implementation of the governing constitutional principles, announced by the Supreme Court. In this Court's opinion, all things considered, the Board's plan is a feasible, adequate and sound solution of this whole problem. The Court cannot agree at all that the plan offered by the respondents is an evasive method to circumvent the decisions of the Supreme Court, as counsel has pointed out in argument.

Respondents here, in the Court's opinion, have shown with certainty that it would not be advisable or practicable to order immediate desegregation at all levels at Memphis State College, as contended for by the plaintiffs, but the plan of respondents to accomplish this over a five year

period of time is necessary in the public interest and to carry out the Supreme Court's ruling in an effective manner. In this connection, the Court is obliged to consider, among other things, the present very limited physical facilities of the school. Thirty-five hundred [170] and thirty-two students have entered this year, an all time high. The Court is obliged to consider the likelihood that this school's accredited standing and membership in the Southern Association of Colleges would very likely be adversely affected should unrestricted integration of the races be ordered forthwith. All of us, the Court feels sure, recognize the importance of this.

As respondents point out also, and as the proof shows, necessary funds to operate the college on a basis of unrestricted admission of students will not be available before July, 1957.

The Court, I should say, too, feels that gradual integration provided for in the respondents' plan is in the interest of a harmonious solution,—that is, a solution without friction between the races. After all these years, the problems incident to a changeover to integrated public schools are many and varied.

Now, this is not in the record, but it is a matter of common knowledge that, despite the greatly enlarged school-building programs around the [171] country, there is severe crowding in practically every State of the Union. It has arrived at the crisis stage, as all of us know who read at all, and will be, as I understand, high up on the "must list" when the Congress convenes in January. To assist in solving this most serious problem, there has been called a conference at the White House for late November. I mention this in passing.

Now, the respondent Board members, as the Court understands this case, are asking that they be given suffi-

cient time within which to complete orderly and peaceful integration, and the Court agrees the request is in all things reasonable. The respondents, it is very evident, are proceeding in this matter with all deliberate speed.

Incidentally, our own Court of Appeals in a Detroit Housing Case, decided last week, had something to say on problems presented in the situation which confronts the Court at this time.

Now, as the Court has pointed out here today, this case was filed before the Supreme Court's [172] opinion of May 31st in the Brown case, where the Supreme Court recognized, among others, the existence of important administrative problems. The plaintiffs had no opportunity before this was filed to consider it in the light of that case and what now is the plain law governing the transition from segregation to integration in the public schools.

The Court, in the circumstances of this case, approves in all things the integration plan which the respondents submit. The respondents have clearly demonstrated that time is absolutely necessary to carry out the Supreme Court's ruling in an effective manner.

While the September school term has been under way, I might say here, for a couple of weeks, more or less, any qualified negro students at the graduate level will be eligible to enter at this time under the plan which the Court in this proceeding is approving.

Now, what the Court has said will suffice, at least temporarily, as its findings and [173] conclusions under the rules. The Court has only hit the high spots, but if more detailed findings and conclusions are necessary, I suggest counsel for the respondents may submit them with a judgment in accordance with the Court's views here expressed, during the next few days. Plaintiffs' counsel may have the same privilege, and may submit proposed findings and conclusions, if they would like. I suggest the final

judgment to be drawn by counsel for respondents be first submitted to plaintiffs' counsel.

Now, the Court would like to make a few observations of its own. The lawsuit is over, but if I may say so, we all live in a mighty good state. Many of those present are citizens of Memphis, a very fine, clean, friendly city. Educational facilities in this State, and particularly in Memphis, for both white and colored, are the very best, as most of us know,—I believe, in fact, schools for the whole country. The races have lived well together in this State and this City. We have in Tennessee and Memphis the very best citizens, both [174] white and colored. The names of Blair Hunt, principal of Booker T. Washington High School, and Hollis Price, the President of LeMoyne College, immediately come to mind. Both, incidentally, have served on juries in this Court. I am also thinking of Ernest Ball of the State Board of Education, who has also been superintendent of the Memphis Public Schools for many years.

Now, as I say, stepping out of the character of Judge, I would suggest, in an effort to be helpful, that these fine citizens and possibly others like them, might make a real contribution to the settlement of the matters here involved if they could sit down together. This, in my humble judgment, should be done without delay. The lawyers in this case could be of tremendous service, I might add.

Now, I clipped this rather pertinent article from one of the local newspapers several days ago, quoting Dean Redd of Fisk University at Nashville, and I shall read it:

> "The Dean of Fisk University believes political leadership and the influence of [175] its many colleges and universities will lead Tennessee to serve as a model for desegregation in the South.

"Dr. George N. Redd, writing in the Negro Journal of Education, said the outlook for desegregation in Tennessee is 'encouraging'.

"He said the state is blessed with the influence of 'a great reservoir of educational leaders not paralleled anywhere else in the deep South—'. He said that 'by tradition, Tennessee's political offices have been relatively free of demagogs who would pounce upon the race issue for political or personal gains * * *.'"

Now, I doubt if there has been any opportunity whatever for discussion of this matter, and I am, as an individual, as I say, suggesting this course in the interest of the harmony between the races we have in this State and City enjoyed so many years. I say to you it is a matter for discussion [176] and patience, and, yes, prayer. Rome was not built in a day, and this matter won't be settled overnight, I can assure you.

I am confident that this is the practical, common sense approach and that it can be worked out and resolved mutually and for the welfare of all concerned, if both sides will work in a spirit of harmony and cooperation.

All right, that is all.

* * *

Finding of Facts and Conclusions of Law

(Filed November 22, 1955)

The Court finds the following facts:

1. That the Tennessee State Board of Education intends promptly to comply with the decision and opinion of the Supreme Court of the United States in the segregation cases and, pursuant to such intention, and in good faith, has devised the plan hereinafter referred to, after consultation with advisory groups representing various segments of affected interests.

2. There was no intention or effort upon the part of the said Board to evade or circumvent the decision of the Supreme Court, but, after full discussion, the Board concluded the plan proposed was the most feasible in view of the physical capacities and financial situation of the various schools under its jurisdiction.

3. Memphis State College at present has the largest enrollment in its history and its physical facilities would be inadequate, should unrestricted admission be decreed.

4. At present, this institution has not been allocated enough funds from the State upon which its existence depends and which constitutes the major portion of its financial support, to authorize unrestricted integration and to allow it to operate should such be done.

5. Memphis State College is located in the portion of the State in which the colored race maintains its highest density of population and is therefore subjected to the potential of a heavy enrollment from members of the colored race.

6. Memphis State College is a member of the State Association of Colleges whose rules require certain standards by all its members. The loss of membership in this association will result in students who take courses at Memphis State College being deprived of credit for work done in such college should they desire to transfer to another member of the association or other similar associations. Virtually all institutions of collegiate standing in the United States are members of this or similar associations. Memphis State College does not now and will not prior to July 1, 1957, have adequate finances to enable it to maintain its membership in this association should there be the increase in applications for instruction therein which very reasonably may flow from unrestricted admission. Due to its location and the high percentage of eligible colored students, a considerable increase in applications to it from qualified students of this race may be expected.

7. The Court further finds that since 1870 the State of Tennessee has pursued a course of segregated schools between the two races and that during this interval customs have arisen between the two races, which might be disturbed seriously by an abrupt abrogation thereof. The Court finds that a gradual plan of desegration in its opinion offers greater possibility of eventual complete acceptance of the situation by members of both races than would an abrupt transition at present.

8. The Court also finds that the respondent members of the Board are proceeding with all deliberate speed in order to complete orderly and peaceful integration. The Court also finds that time is absolutely necessary to carry out in an effective manner the ruling of the Supreme Court.

CONCLUSIONS OF LAW

1. The Court is of the opinion that the decision of the Supreme Court of the United States in the case of Brown v. Topeka, decided May 31, 1955, definitely establishes the invalidity of the Tennessee constitutional provisions and statutes requiring the segregation of the races in the public schools, to the extent that as a matter of law these provisions have been invalid since that date and that such invalidity is so patent that a three-judge district court is unnecessary to determine such invalidity.

2. The Court further concludes as a matter of law that the plan devised by the respondents for the integration of the races in the institutions under the jurisdiction of the respondent State Board of Education is in all respects fair and reasonable and in the opinion of the Court will lead to an orderly and peaceful integration of the two races in such institutions and for this reason the Court expressly approves such plan and directs that it be put into effect.

The State Board of Education and the institutions under its jurisdiction, as set forth in the plan, are hereby directed and required to permit negro students to enroll in said educational institutions as provided by such plan, subject to such reasonable rules as such institutions now have or may adopt as to time of enrollment with reference to the year's work, and as to qualifications for enrollment. The proposed plan of gradual desegregation, a certified copy of which was filed at the hearing, is made a part hereof by reference, and the same should be spread on the minutes of this Court.

The application for a permanent injunction on the part of the plaintiffs should be denied and the costs of the cause

be adjudged as follows: Judgment shall be entered in accordance with this finding of fact and these conclusions of law.

MARION S. BOYD,
U. S. Dist. Judge.

A True Copy.

Attest:

W. LLOYD JOHNSON, Clerk,

By P. G. MCCLURE, D. C.

(Seal)

Final Decree

(Filed November 22, 1955)

This cause came on to be heard at this term, on the motion of plaintiffs for a summary judgment which motion was by the Court denied.

The cause then came on to be heard on oral testimony without the intervention of a jury upon consideration whereof it was ordered, adjudged and decreed as follows, viz.: That the Tennessee State Board of Education and the collegiate institutions under its jurisdiction, as set forth in the plan of gradual desegregation of such institutions, a certified copy of which was filed in the hearing of this cause and heretofore ordered spread upon the minutes of this Court, are hereby directed and required to permit negro students to enroll in said institutions as provided by such plan, subject to such reasonable rules as such institutions now have or may adopt as to time of enrollment with reference to the scholastic year, and as to qualifications for enrollment.

The application for a permanent injunction is denied. The relief sought by plaintiffs being allowed in part and denied in part the costs of the cause are divided for which execution may issue.

MARION S. BOYD,
U. S. District Judge.